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NORTH CAROLINA REPORTS.

VOL. 105.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1890.

REPORTED BY

THEODORE F. DAVIDSON.

(Vol. 14.)

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CASES REPORTED.

	PAGE.
Albemarle Lumber Co. v. Wilcox	34
Allen v. Sallinger	333
Alston v. Hawkins	3
Anderson v. Logan	266
Applegarth v. Tillery	407
Arrington, Avent v	377
Asher v. Reizenstein	213
Avent v. Arrington	377
Bailey v. Brown	127
Bain v. Railroad	363
Bazemore v. Bridges	191
Berry v. Hall	154
Blackwell v. McCaine	460
Blow v. Vaughan	198
Bobbitt v. Rodwell	236
Bost v. Lassiter	490
Branch v. Galloway	193
Britt v. Insurance Co	175
Britt v. Harrell	10
Bridgers, Bazemore v	191
Brown, Bailey v	127
Brower, Manufacturing Co. v	440
Bullock v. Railroad	180
Burgwyn, Burwell v	498, 507
Burwell v. Burgwyn	498, 507
Buxton, Manufacturing Co. v	74
Cartwright v. Kerman	1
Cheatham v. Rowland	218
Coleman v. Fuller	328
Connelly, Sharpe v	87
Connelly, Turner v	72
Connelly, White v	65
Crabtree, Waters v	394
Crawford, Fortescue v	29
Davis, Hayes v	482
Deaton. *In re*	59

	PAGE.
Dixon, Rountree v	350
Dowd v. Watson	476
Dowd v. Stephenson	467
Downing. Winborne v	20
Douglas, Wallace v	42
Duke v. Markham	131, 138
Ellison v. Sexton	356
Emry v. Railroad	44, 45
Fertilizer Co. v. Reams	283
Fisher v. Mining Co	123
Fort, Smith v	446
Fortescue v. Crawford	29
Fuller, Coleman v	328
Galloway, Branch v	193
Gay v. Grant	478
Gooch, Grant v	278
Gooch v. Peebles	411
Gore v. Townsend	228
Grant, Gay v	478
Grant v. Gooch	278
Green v. Sherrod	197
Green, Helms v	251
Griffith v. Winborne	403
Hahn, Shaffer v	121
Hall, Berry v	154
Harrell, Britt v	10
Hawkins, Alston v	3
Haggard, Mitchell v	173
Hayes v. Davis	482
Helms v. Green	251
Hill, Hodges v	130
Hodges v. Railroad	170
Hodges v. Hill	130
Hodges, Robeson v	49
Hodges, McNeill v	52
Hodges, Taylor v	344
Horne v. Smith	322
In re Smith	167
In re Deaton	59

	PAGE.
Insurance Co., Britt v	175
Jackson v. Jackson	433
Johnson, Wilson v	211
Kerman, Cartwright v	1
Kornegay v. Styron	14
LaRoque, Thurber v	301
Lassiter, Bost v	490
Long v. Walker	90
Logan, Anderson v	266
Lumber Co. v. Wilcox	34
Manufacturing Co. v. Brower	440
Manufacturing Co. v. Buxton	74
Markham, Duke v	131, 138
McAdoo v. Railroad	140
McCaine, Blackwell v	460
McKinney, Nixon v	23
McNeill v. Hodges	52
Mining Co., Fisher v	123
Mitchell v. Haggard	173
Navigation Co. v. Taylor	484
Nixon v. McKinney	23
Norris v. Stewart	455
Orenshaw, Reavis v	369
Overby, Ruffin v	78
Parker, Railroad v	246
Peebles, Gooch v	411
Perry v. Young	463
Pettipher, Whitehurst v	39, 40
Plummer, Taylor v	56
Proctor v. Proctor	222
Railroad, Emry v	44, 45
Railroad, Bain v	363
Railroad v. Parker	246
Railroad, Hodges v	170
Railroad, Bullock v	180
Railroad, McAdoo v	140
Ray v. Stewart	472
Reams, Fertilizer Co. v	283

	PAGE.
Reavis v. Orenshaw	369
Reizenstein, Asher v	213
Robeson v. Hodges	49
Rodwell, Bobbitt v	236
Rose v. Shaw	126
Rowland, Cheatham v	218
Rountree v. Dixon	350
Ruffin v. Overby	78
Sallinger, Allen v	333
Sexton, Ellison v	356
Sharpe v. Connelly	87
Shaffer v. Hahn	121
Shaw, Rose v	126
Sherrod, Green v	197
Smith, *In re*	167
Smith v. Fort	446
Smith, Horne v	322
Stewart, Norris v	455
Stephenson, Dowd v	467
Stewart, Ray v	472
Styron, Kornegay v	14
Taylor v. Navigation Co	484
Taylor v. Hodges	344
Taylor v. Plummer	56
Thurber v. LaRoque	301
Tillery, Applegarth v	407
Townsend, Gore v	228
Tucker v. Wilkins	272
Turner v. Connelly	72
Vaughan, Blow v	198
Walker, Long v	90
Wallace v. Douglas	42
Waters v. Crabtree	394
Watson, Dowd v	476
White v. Connelly	65
Whitehurst v. Pettipher	39–40
Wilson v. Johnson	211
Wilkins, Tucker v	272
Winborne, Griffith v	403
Winborne v. Downing	20
Wilcox, Albemarle Lumber Co. v	34
Young, Perry v	463

CASES CITED.

		PAGE.
Adams v. Utley	87 N. C., 356	282
Allen v. Chambers	4 Ired. Eq., 126	31, 203
Allen v. Bowen	74 N. C., 155	271
Albright v. Albright	88 N. C., 238	102, 114
Alvany v. Powell	2 Jones' Eq., 51	365
Andrews v. Whisnant	83 N. C., 446	125, 129
Armfield v. Moore	97 N. C., 34	6
Arnold v. Estis	92 N. C., 162	102, 119
Arrington v. Arrington	91 N. C., 301	463
Austin v. King	97 N. C., 339	86
Avery v. Pritchard	93 N. C., 266	125, 128
Barton v. Morphes	2 Dev., 520	29
Barbee v. Green	92 N. C., 471	291
Battle v. Mayo	102 N. C., 413	291
Batchelor v. Whitaker	88 N. C., 350	271
Barlow v. Norfleet	72 N. C., 535	69, 71
Barnes v. Lewis	73 N. C., 138	69
Bartlett v. Simmons	4 Jones', 295	86
Barrett v. Richardson	76 N. C., 423	109
Baker v. Cordon	86 N. C., 116	64
Bailey v. Brown	*Ante*, 127	125
Bevers v. Park	88 N. C., 456	224
Beasley v. Bray	98 N. C., 266	245
Bitting v. Thaxton	72 N. C., 541	349
Black v. Caldwell	4 Jones', 150	259
Blanchard v. Blanchard	3 Ired., 105	210
Blow v. Vaughan	*Ante*, 198	212
Bobbitt v. Insurance Co.	66 N. C., 70	178
Boyett v. Vaughan	85 N. C., 365	51
Bonham v. Craig	80 N. C., 224	31, 262, 281
Boyd v. Turpin	94 N. C., 137	313
Bond v. Coke	71 N. C., 97	325
Bryan v. Lawrence	5 Jones', 337	325, 326
Brittain v. Daniels	94 N. C., 781	342
Brooks v. Brooks	90 N. C., 142	282
Britt v. Benton	79 N. C., 177	248
Brown v. Brown	4 Jones', 123	222
Brown v. Coble	76 N. C., 391	205

		PAGE.
Brown v. Mitchell	102 N. C., 347	163, 165, 242, 263
Brown v. Cooper	89 N. C., 238	9
Breaid v. Munger	88 N. C., 297	32
Burns v. McGregor	90 N. C., 222	313
Bullinger v. Marshall	70 N. C., 520	217
Bullock v. Railroad,	*Ante*, 180	153
Burton v. Spiers	87 N. C., 87	114, 314
Butler v. Stainback	87 N. C., 216	115
Bunn v. Wells	94 N. C., 67	23, 271
Burke v. Turner	85 N. C., 500	390
Butts v. Screws	95 N. C., 218	466
Candler v. Langsford	4 D. & B., 18	473
Canon v. Robinson	67 N. C., 53	355
Campbell v. McArthur	2 Hawks, 33	389
Carson v. Ray	7 Jones, 609	205
Carpenter v. Wall	4 D. & B., 144	329, 332
Carlton v. Railroad	104 N. C., 365	189
Capps v. Holt	5 Jones' Eq., 153	32, 203
Capps v. Capps	85 N. C., 408	51
Carpenter v. Tucker	98 N. C., 316	151
Carrier v. Hampton	11 Ired., 307	138
Campbell v. Brown	86 N. C., 376	6, 9
Carlton v. Watts	82 N. C., 212	101
Chastine v. Philips	11 Ired., 255	389
Chambers v. Railroad	91 N. C., 471	151
Cheatham v. Jones	68 N. C., 153	114
Clerk's Office v. Allen	7 Jones, 156	97
Clerk's Office v. Bank	66 N. C., 214	97
Clerk v. Wagoner	4 Ired., 131	97
Clement v. Foster	99 N. C., 255	463
Clayton v. Hester	80 N. C., 279	466
Clarke v. Diggs	6 Ired., 159	473
Clark v. Hay	98 N. C., 424	313
Clark v. Williams	70 N. C., 679	55
Commissioners v. Bennett	68 N. C., 494	314
Commissioners v. Magnin	85 N. C., 114	54
Cohen v. Stewart	98 N. C., 97	38
Comron v. Standland	103 N. C., 207	12, 348
Covington v. Ingram	64 N. C., 123	453
Coble v. Coble	2 Jones' Eq., 392	439
Coates v. Wilkes	92 N. C., 382	262
Cooper v. Middleton	94 N. C., 86	291
Cox v. Delano	3 Dev., 89	297

		PAGE.
Cox v. Cox	91 N. C., 256	203
Cobb v. Halliburton	92 N. C., 652	115
Corpening v. Kincaid	82 N. C., 202	108
Cross v. Williams	91 N. C., 496	126
Cromartie v. Commissioners	85 N. C., 211	62, 64
Crummen v. Bennett	68 N. C., 494	316
Cuningham v. Bell	83 N. C., 238	307
D., D. & B. Institute v. Norwood	Busb. Eq., 65	203
Daniel v. Crumpler	75 N. C., 184	34
Davis v. Higgins	91 N. C., 382	85
Davidson v. Arledge	97 N. C., 172	205
DeCourcy v. Barr	Busb. Eq., 181	71, 138
Devane v. Fennell	2 Ired., 36	39
Devereux v. Devereux	81 N. C., 12	481
Dobson v. Erwin	1 D. & B., 569	319
Dobson v. Murphy	1 D. & B., 586	390
Dobson v. Chambers	78 N. C., 334	50
Doughty v. Railroad	78 N. C., 22	172
Dougherty v. Sprinkle	88 N. C., 300	131
Dunn v. Barnes	73 N. C., 273	55, 61
Duvall v. Rollins	71 N. C., 218	314
Duke v. Markham	*Ante*, 131	71
Dugger v. McKesson	100 N. C., 1	336
Dickens v. Barnes	79 N. C., 490	203
Dixon v. Dixon	81 N. C., 323	320
Earle v. Hardie	80 N. C., 177	101
Edgerton v. Jones	102 N. C., 278	198
Edwards v. Bowden	99 N. C., 80	206
Eigenbrun v. Smith	98 N. C., 207	244
Ely v. Early	94 N. C., 1	165
Ellis v. Harris	(This term, Vol. 106)	86
Ellington v. Ellington	103 N. C., 54	390
Emry v. Railroad	102 N. C., 209	48, 151
England v. Garner	84 N. C., 212	453
Erwin v. Erwin	4 Jones' Eq., 82	438-439
Evans v. Etheridge	99 N. C., 43	68, 138
Evans v. Etheridge	96 N. C., 42	69
Everton v. Everton	5 Jones, 202	438
Farmer v. Batts	83 N. C., 387	206
Farmer v. Railroad	88 N. C., 564	188
Faulcon v. Johnston	102 N. C., 269	86

		PAGE.
Ferrell v. Broadway	95 N. C., 551	164
Fitzgerald v. Shelton	95 N. C., 519	259
Finch v. Baskerville	85 N. C., 205	51, 172
Flaum v. Wallace	103 N. C., 296	310
Fleming v. Burgin	2 Ired. Eq., 584	138
Flynt v. Bodenhamer	80 N. C., 205	165
Fowler v. Poor	93 N. C., 466	453
Fraley v. March	68 N. C., 160	446
Frick v. Hilliard	95 N. C., 117	466
Freeman v. Person	(This term, Vol. 106.)	71
Francis v. Edwards	77 N. C., 271	217
Frank v. Robinson	96 N. C., 28	243
Gaster v. Thomas	1 Ired. Eq., 199	163
Gamble v. Rhyne	80 N. C., 183	101
Garner v. Garner	Busb. Eq., 1	21
Gaylord v. Respass	92 N. C., 553	342
Gaster v. Hardie	75 N. C., 460	314
Gheen v. Summey	80 N. C., 187	100, 115
Gowing v. Rich	1 Ired., 553	319
Graybeal v. Davis	95 N. C., 508	23, 271
Grier v. Rhyne	69 N. C., 346	203, 211
Gregory v. Hobbs	93 N. C., 1	217
Gregory v. Perkins	4 Dev., 50	399
Griffith v. Griffith	89 N. C., 114	439
Grant v. Burgwyn	84 N. C., 560	5
Grant v. Edwards	86 N. C., 513	101, 115
Grantham v. Kennedy	91 N. C., 148	110
Grant v. Reese	90 N. C., 3	43
Gregory v. Ellis	82 N. C., 225	69
Gunter v. Wicker	85 N. C., 310	188
Gulley v. Macy	84 N. C., 434	31
Guy v. Manuel	89 N. C., 83	282
Gwathmey v. Pearce	74 N. C., 399	231
Harding v. Long	103 N. C., 1	165, 265
Harrell v. Butler	92 N. C., 20	203, 207
Harrell v. Warren	100 N. C., 259	75
Hare v. Jernigan	76 N. C., 471	55
Harrison v. Hahn	95 N. C., 28	203, 210
Hardy v. Simpson	13 Ired., 132	243, 259
Hardy v. Skinner	9 Ired., 191	244, 259
Hardin v. Barrett	6 Jones, 159	389
Harrison v. Harrison	7 Ired, 484	438

		PAGE.
Hailey v. Gray	93 N. C., 195	463
Harrell v. Godwin	102 N. C., 330	466
Haywood v. Daves	81 N. C., 8	481
Hannon v. Grizzard	99 N. C., 161	481
Hamlin v. Mebane	1 Jones' Eq., 18	9
Harris v. Jones	83 N. C., 317	13
Headen v. Womack	88 N. C., 468	9
Heileg v. Dumas	65 N. C., 214	456
Hicks v. Bullock	96 N. C., 164	23, 271
Hicks v. Gooch	93 N. C., 112	463
Hinson v. Adrian	91 N. C., 372	76
Hinton v. Roach	94 N. C., 106	207
Hilliard v. Phillips	81 N. C., 99	210
Hinchey v. Nichols	72 N. C., 66	203, 207
Holmes v. Marshall	72 N. C., 37	68
Hodges v. Council	86 N. C., 181	9
Hodges v. Lassiter	96 N. C., 351	243, 245
Howell v. Railroad	68 N. C., 395	56
Holler v. Richards	102 N. C., 545	31
Horton v. Green	104 N. C., 400	40
Houck v. Adams	98 N. C., 519	9
Hughes v. Boone	81 N. C., 204	55
Hughes v. Hodges	102 N. C., 236	110, 311
Hunter v. Kelly	92 N. C., 285	389
Huntley v. Huntley	8 Ired. Eq., 250	21
Ijames v. McClamrock	92 N. C., 362	51
In re Oldham	89 N. C., 23	62
In re Daves	81 N. C., 72	62
In re Walker	82 N. C., 95	62
Jackson v. Buchanan	89 N. C., 74	69
Jackson v. Rhem	6 Jones' Eq., 141	165
Jenkins v. Ore Co	65 N. C., 563	281
Jones v. Statesville	97 N. C., 86	445
Jones v. Call	89 N. C., 188	43, 297, 463
Jones v. Cohen	82 N. C., 75	259
Jones v. Mial	82 N. C., 252	55
Joyner v. Joyner	6 Jones' Eq., 322	438
Justice v. Eddings	75 N. C., 581	129
Kelly v. McCallum	83 N. C., 563	281
Keener v. Goodson	89 N. C., 273	115, 390

		PAGE.
Kea v. Robeson	5 Ired. Eq., 373	208
Kirk v. Railroad	97 N. C., 82	151
Kirkman v. Dixon	66 N. C., 406	174
Kitchen v. Herring	7 Ired. Eq., 190	209
Knowles v. Railroad	102 N. C., 62	209, 440
Knott v. Burwell	96 N. C., 272	192, 463
Knight v. Houghtalling	85 N. C., 17	55
Koonce v. Russell	103 N. C., 179	94
Kornegay v. Everett	99 N. C., 30	165
Kramer v. Electric Light Co	95 N. C., 277	217
Latham v. Blakely	70 N. C., 368	325
Lambert v. Kinnery	74 N. C., 348	129, 311, 314
Lambert v. Lambert	11 Ired., 162	137
Lee v. Flannagan	7 Ired., 471	259
Levy v. Griffis	65 N. C., 236	307
Lewis v. Rountree	81 N. C., 20	481
Levit v. Moring	8 Ired., 312	77
Lenoir v. South	10 Ired., 237	85
Leak v. Covington	95 N. C., 193	43
Leach v. Railroad	65 N. C., 486	50
Littlejohn v. Egerton	76 N. C., 468	311
Little v. McCarter	89 N. C., 233	50
Lilly v. Wooley	94 N. C., 412	6
Lutz v. Cline	89 N. C., 186	43
Lockhart v. Bell	90 N. C., 499	481
Long v. Jarratt	94 N. C., 443	354, 496
Lowder v. Noding	8 Ired. Eq., 208	332
Loftin v. Crossland	94 N. C., 76	313
Logan v. Wallis	76 N. C., 416	172
Love v. Ingram	104 N. C., 600	227
Logan v. Simmons	1 D. & B., 16	259
Loftin v. Cobb	1 Jones, 406	86
Lowdermilk v. Corpening	92 N. C., 333	108, 115
Long v. Walker	*Ante*, 90	122
Long v. Logan	86 N. C., 535	54
Lutz v. Cline	89 N. C., 186	463
Lyon v. McMillan	72 N. C., 392	126
Lyon v. Atkyn	78 N. C., 258	307
Mason v. McCormick	85 N. C., 226	282
Mauney v. Coit	86 N. C., 463	297
Mauney v. Long	91 N. C., 170	76
Mayo v. Leggett	96 N. C., 237	389

		PAGE.
Mason v. Hearne	Busb. Eq., 88	399
May v. Gentry	4 D. & B., 117	38
Mayer v. Adrian	77 N. C., 83	32
Massey v. Belisle	2 Ired., 170	204
Manly v. Railroad	74 N. C., 655	150
Martin v. Chastine	75 N. C., 96	129
MacRae v. Lilly	1 Ired., 118	457
McGlawhorn v. Worthington	98 N. C., 199	205
McClenahan v. Cotten	83 N. C., 332	217
McCormick v. Munroe	3 Jones, 332	85
McLean v. Smith	(This term, Vol. 106)	86
McKinnon v. Morrison	104 N. C., 354	42, 58, 265, 490
McIntire v. Railroad	67 N. C., 278	248
McQueen v. McQueen	82 N. C., 471	438
McCanless v. Flinchum	98 N. C., 358	102, 118
McCracken v. Adler	98 N. C., 400	119
McDonald v. Carson	94 N. C., 497	151
McCormick v. Monroe	1 Jones, 16	203
McKinder v. Littlejohn	4 Ired., 198	5
Mebane v. Layton	89 N. C., 396	102, 119
Mebane v. Pope	81 N. C , 22	50
Meredith v. Coal and Iron Company	99 N. C., 576	151
Meadows v. Cozart	76 N. C., 450	411
Mitchell v. Brown	88 N. C., 156	339
Miller v. Miller	89 N. C., 402	31, 102, 114
Morgan v. Perkins	1 Jones, 171	38
Moring v. Little	98 N. C., 472	244
Molyneux v. Huey	81 N. C., 113	429
Morris v. Rippy	4 Jones, 533	129
Mock v. Coggin	101 N. C., 366	453
Morrison v. Baker	81 N. C., 76	32
Morrison v. Watson	101 N. C., 332	99, 102, 115, 118
Morrison v. Watson	95 N. C., 479	339
Mobley v. Griffin	104 N. C., 112	83
Motley v. Jones	3 Ired. Eq., 144	297
Moseley v. Moseley	87 N. C., 69	306
Moore v. Valentine	77 N. C., 188	326
Moore v. Reed	2 Ired. Eq., 580	163
Moore v. Parker	12 Ired., 123	476
Moore v. Parker	91 N. C., 275	59
Moore, *ex parte*	63 N. C., 397	64
Moye v. Cogdell	66 N. C., 403	64
Murdock v. Anderson	4 Jones' Eq., 77	203

		PAGE.
Murphy v. Harrison	65 N. C., 246	51
Murdock v. Anderson	4 Jones' Eq., 77	32
Murray v. Smith	1 Hawks, 41	124
Neville v. Pope	95 N. C., 346	131
Norris v. McLane	104 N. C., 159	198
Norment v. Brown	79 N. C., 363	292
Osborne v. Calvert	83 N. C., 365	220
Page v. Goodman	8 Ired. Eq., 16	319
Page v. Branch	97 N. C., 97	342
Patterson v. Wadsworth	94 N. C., 538	388
Pasour v. Lineberger	90 N. C., 159	277
Patton v. Clendenin	3 Murph., 68	306
Patton v. Railroad	96 N. C., 455	31
Patton v. Baird	7 Ired. Eq., 255	220
Parker v. Railroad	86 N. C., 221	153
Pegues v. Pegues	5 Ired. Eq., 418	306
Pelletier v. Saunders	67 N. C., 262	445
Peterson v. Vann	83 N. C., 118	453
Pearce v. Mason	78 N. C.. 37	50
Penny v. Smith	Phil., 35	50
Perry v. Hardison	99 N. C., 21	245
Phillips v. Thompson	73 N. C., 543	271
Phillips v. Davis	69 N. C., 117	271
Phifer v. Erwin	100 N. C., 59	245
Pittman v. Kimberly	92 N. C., 562	128
Pippen v. Wesson	74 N. C., 437	310
Plummer v. Owens	Busb. Eq., 254	32
Potter v. Everett	7 Ired. Eq., 152	163, 230
Porter v. Railroad	97 N. C., 66	339
Purvis v. Carstaphan	73 N. C., 575	230
Railroad v. Davis	2 D. & B., 451	248
Railroad v. Ely	101 N. C., 8	249
Railroad v. Phillips	78 N. C., 50	249
Railroad v. Wicker	74 N. C., 220	250
Railroad v. Deal	90 N. C., 110	325
Railroad v. McCaskill	94 N. C., 746	152
Redmond v. Commissioners	87 N. C., 122	365
Redman v. Graham	80 N. C., 231	388
Rencher v. Wynne	86 N. C., 268	313
Reiger v. Davis	67 N. C., 189	263

		PAGE.
Rhem v. Tull	13 Ired., 57	319
Rigler v. Railroad	94 N. C., 610	150
Ricks v. Pulliam	94 N. C., 225	23, 271
Roulhack v. Brown	87 N. C., 1	277
Rowland v. Windley	86 N. C., 36	281
Rogers v. Gooch	87 N. C., 442	282
Rogers v. Clements	92 N. C., 81	2
Rountree v. Britt	94 N. C., 104	348
Rountree v. Brinson	98 N. C., 107	269
Robins *ex parte*	63 N. C., 309	62
Rollins v. Love	97 N. C., 210	128
Robinson v. Willoughby	70 N. C., 358	138
Robinson v. Willoughby	65 N. C., 520	399
Rowland v. Thompson	65 N. C., 110	54
Robeson v. Hodges	*Ante*, 49	55, 75
Rogers v. Mabe	4 Dev., 180	393
Russell v. Davis	99 N. C., 115	174
Rutledge v. Smith	Busbee's Eq., 283	270
Sandlin v. Ward	94 N. C., 490	165
Savage v. Knight	92 N. C., 493	243
Scott v. Railroad	96 N. C., 428	151
Scott v. Battle	85 N. C., 185	310
Scott v. Elkins	83 N. C., 424	85
Scott v. Green	89 N. C., 278	58
Scott v. Kenan	94 N, C., 296	110
Scroggins v. Scroggins	85 N. C., 347	438
Scheiffelin v. Stevens	1 Winst., 106	360
Seymour v. Cohen	67 N. C., 345	126
Skinner v. Cox	4 Dev., 59	399
Slaughter v. Winfrey	85 N. C., 160	96
Smaw v. Cohen	95 N. C., 85	131
Smith v. Fite	98 N. C., 517	339
Smith v. Coor	104 N. C., 139	348
Smith v. Campbell	3 Hawks, 590	248
Smith v. Low	2 Ired., 457	210
Smith v. Railroad	99 N. C., 241	151
Snowden v. Railroad	95 N. C., 93	189
Southal v. Shields	81 N. C., 28	55
Spencer v. Credle	102 N. C., 68	249
Spencer, *ex parte*	95 N. C., 271	463
Speer v. James	94 N. C., 417	224
State v. Atkinson	93 N. C., 519	165
State v. Bullard	100 N. C., 486	29

		PAGE.
State v. Ballard	79 N. C., 627	58
State v. Bailey	100 N. C., 528	58
State v. Green	85 N. C., 600	61
State v. Gooch	94 N. C., 982	327
State v. Garris	98 N. C., 733	348
State v. Hamilton	(This term, Vol. 106)	63
State v. Jones	91 N. C., 654	327
State v. Lawrence	81 N. C., 522	61
State v. Massey	104 N. C., 877	170
State v. McDowell	84 N. C., 798	192, 463
State v. Mott	4 Jones, 449	62
State v. Murdock	85 N. C., 598	63
State v. Powell	86 N. C., 640	63
State v. Perkins	82 N. C., 681	61
State v. Peebles	67 N. C., 97	53
State v. Polk	91 N. C., 652	192, 463
State v. Reid	1 D. & B., 377	124
State v. Swepson	81 N. C., 571	125
State v. Williams	2 Jones, 257	165
State v. Woodfin	5 Ired., 199	61, 64
State v. Yancey	1 Car. L. R., 133	64
Staton v. Mullis	92 N. C., 623	85, 271
Stell v. Barham	87 N. C., 62	270
Strickland v. Cox	102 N. C., 411	61
Strauss v. Beardsley	79 N. C., 59	292
Stamps v. Insurance Co	77 N. C., 209	295
Stradley v. King	84 N. C., 635	453
Street v. Tuck	84 N. C., 605	172
Sutton v. Schonwald	80 N. C., 20	463
Sutton v. McMillan	72 N. C., 102	126
Superior Court Office v. Lockman	1 Dev., 146	97
Summers, *ex parte*	5 Ired., 149	62
Summerlin v. Cowles	101 N. C., 473	8
Tate v. Southard	3 Hawks, 121	390
Taylor v. Taylor	76 N. C., 436	439
Taylor v. Plummer	*Ante*, 56	42
Tatom v. White	95 N. C., 453	71
Thames v. Jones	97 N. C., 121	342
Thomas v. Connelly	104 N. C., 342	88
Thornton v. Brady	100 N. C., 38	52, 58
Thaxton v. Williamson	72 N. C., 125	453
Todd v. Outlaw	79 N. C., 235	71, 137
Torrence v. Davidson	90 N. C., 2	43

		PAGE.
Towles v. Fisher	77 N. C., 437	312, 313
Tredwell v. Graham	88 N. C., 208	264
Troy v. Railroad	99 N. C., 298	151, 188
Trimble v. Hunter	104 N. C., 129	497
Tucker v. Baker	86 N. C., 1	209
Tucker v. Baker	94 N. C., 162	281
Turrentine v. Railroad	92 N. C., 638	76, 151, 339
University v. Lassiter	83 N. C., 38	54
University v. Bank	92 N. C., 651	463
Vaughan v. Lewellyn	94 N. C., 472	291
Vickers v. Leigh	104 N. C., 248	270
Walker v. Reidsville	96 N. C., 382	150
Walker v. Scott	102 N. C., 487	129, 175
Walker v. Walker	1 Winst., 258	222
Walker v. Wright	2 Jones', 156	5
Walton v. Parrish	95 N. C., 259	21
Walton v. Sugg	Phil. Law., 98	427
Wallace v. Douglas	*Ante*, 42	76
Wall v. Fairley	77 N. C., 105	320
Waugh v. Miller	75 N. C., 127	271
Waugh v. Richards	8 Ired., 470	204
Watson v. Dodd	72 N. C., 240	481
Walsh v. Hall	66 N. C., 233	349
Wall v. Williams	91 N. C., 477	217
Waldo v. Belcher	11 Ired., 609	38
Ward v. Sanders	6 Ired., 382	210
Welsh v. Kinsland	93 N. C., 281	463
West v. Reynolds	94 N. C., 333	463
Weathersbee v. Farrar	97 N. C., 106	313
Welfare v. Thompson	83 N. C., 276	329, 332
White v. Connelly	*Ante*, 65	73
White v. Beaman	96 N. C., 122	282
White v. Utley	94 N. C., 511	463
White v. White	84 N. C,. 340	438
White v. Holly	91 N. C., 67	33, 389
Whitehead v. Spivey	103 N. C., 66	314
Whitaker v. Hill	96 N. C., 2	498
Whorton v. Eborn	88 N. C., 345	203, 205
Williams v. Wallace	78 N. C., 354	86
Wilson v. Patton	87 N. C., 318	101, 115
Wilson v. Hughes	94 N. C., 182	349

		PAGE.
Wilson v. Railroad	90 N. C., 69	189
Williamson v. Hartman	92 N. C., 236	453
Williams v. Griffin	4 Jones, 31	137
Wittkowsky v. Wasson	71 N. C., 451	39
Winchester v. Reid	8 Jones 377	259
Withrow v. Biggerstaff	82 N. C., 82	342
Wilcox v. Wilcox	1 Ired., Eq., 36	438
Wiseman v. Cornish	8 Jones, 218	165
Wooten v. Hill	98 N. C., 49	348
Woodlief v. Harris	95 N. C., 211	348
Woodruff v. Bowles	104 N. C., 197	243
Woody v. Jordan	69 N. C., 189	216
Worth v. Commissioners	90 N. C., 409	365
Wright v. Cain	93 N. C., 296	31, 151
Wyche v. Wyche	85 N. C., 96	108
Yancey v. Greenlee	90 N. C., 319	342
Young v. Jackson	92 N. C., 144	68, 71, 110
Young v. Greenlee	82 N. C., 346	259

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1890.

A. CARTWRIGHT, Adm'r of NATHAN RICHARDSON, v. HENRY A. KERMAN.

Admissions—Presumption of Payment—Evidence.

In an action against the principal obligor in a bond, executed prior to 1868, his admission that neither he nor his surety have paid the bond is sufficient to rebut the presumption of payment, nothing else appearing.

This was an ACTION, tried before *Boykin, J*, at February Term, 1889, BEAUFORT Superior Court.

The action was begun before a Justice of the Peace in 1888, on a joint bond signed by defendant and one Jordan, June 10, 1867, for the sum of $90.50, and thence by appeal came to the Superior Court. At the trial in the Superior Court the execution of the bond was admitted. The plaintiff introduced as witness one Simmons, who testified as to sundry admissions of the defendant, which were relied on to rebut the presumption of payment. So much of his evidence as is material appears in the opinion. The defendant introduced no testimony, and asked the Court to charge the jury that the evidence was not sufficient to repel the presumption of payment. The Court declined, and instructed the jury that, if they believed the evidence, the plaintiff was entitled to recover. Defendant excepted. Verdict and judgment for plaintiff. Defendant appealed.

Mr. C. F. Warren, for plaintiff.
Mr. J. H. Small, for defendant.

CLARK, J.—after stating the facts: The defendant, who is alone sued, and who, by his admission, is the principal obligor, stated to the witness in 1881 or 1882, "that neither he nor Jordan (the surety) had paid the note," and at the trial of this case before the Justice of the Peace he stated that he had made such admission to the witness, and that "the note had not been paid since." The Court properly told the jury that, if they believed the evidence, the presumption of payment had been rebutted.

This case differs from *Rogers* v. *Clements*, 92 N. C., 81, and 98 N. C., 180, in that here it is not the admission of one of two co-obligors that he has not paid the debt, which was held in that case not competent against the other, who was not present when such admission was made. In the present case, the principal obligor and sole defendant admits that neither he nor the surety has paid the note. Such admission is good against the party making it. Rev. Code, ch. 65, § 22. It would not be evidence against the surety, but he is not sued, and the judgment herein cannot be given in evidence against him, for the defendant, being the principal obligor, cannot call upon him for contribution.

Affirmed.

A. D. ALSTON, Ex'r of SARAH M. ALSTON, v. JAMES B. HAWKINS.

Presumption of Payment—Non-residence—Insolvency—Evidence—Statute of Limitations.

1. If insolvency of the obligor is relied upon to rebut the presumption of payment arising from the lapse of time, it must be shown to have existed continuously during the entire statutory period.
2. The non-residence alone of the obligor is not sufficient to rebut the presumption of payment arising from the lapse of time, though evidence of that fact is competent in support of other proof, such as insolvency, to rebut the presumption of payment.
3. Where the defendant was a non-resident, and the only evidence of insolvency was a letter written by him to a person, not in any way connected with the bond sued on, from which it appeared that he was in possession of considerable property, but in which he declared that he had his property so fixed that his creditors could not disturb it: *Held* not sufficient to rebut the presumption of payment.
4. If *actual* payment is relied upon, the prohibition of the competency of parties in interest as witnesses does not apply—*aliter* where the statute of *presumption* of payment is invoked.

This is a CIVIL ACTION, which was tried before *Boykin, J.*, at September Term, 1889, of WARREN Superior Court.

The suit was upon a note, under seal, executed by the defendant to plaintiff's testatrix on 4th August, 1856. There was a payment of $100, endorsed June 1st, 1866. The defendant relied upon the presumption of payment under the statute (Rev. Code, ch. 65, § 16). To rebut the presumption, the plaintiff showed that defendant has resided in Texas since the year 1857, and introduced, after objection, the following letter written by defendant:

"CANEY POST-OFFICE, MATAGORDA CO., TEX.,
"March 23, 1871.

"DEAR CHARLES: I received your letter last week, requesting me to send you five thousand dollars, which is impossible for me to do. All my crop of last year will not bring more than five thousand dollars. I have not paid the thousand dollars I borrowed to send you. I promised to pay it out of last crop, which I will do. I owe other debts, but cannot pay them just now. I have had my property so fixed my creditors cannot disturb it, but I will pay every debt I owe in the world, but I must have a little time to do so. When I sell my sugar I will send you all the money I can. I expected to get some money from the bank. The suit has not been decided in the Supreme Court. I think I will recover half after awhile. I have a full supply of hands this year, cultivating all the plantation. Hope to make a good crop this year. * * *

"Yours truly,
"JAMES B. HAWKINS."

His Honor intimated his opinion that there was no evidence to go to the jury to rebut the presumption of payment, in submission to which the plaintiff suffered a nonsuit, and appealed.

Messrs. J. B. Batchelor and *John Devereux, Jr.*, for the plaintiff.

Mr. E. C. Smith, for the defendant.

SHEPHERD, J.: "The presumption of payment arising from lapse of time under the statute is one which the law itself makes, and it has such an artificial and technical weight that whenever the facts are admitted, or established, the Court must apply it as an inference or intendment of the law; and so, too, the question whether that presumption has been rebutted is one of law, which, when the facts are ascertained, the Court must determine, and not leave to the discretion of the jury." RUFFIN, J., in *Grant* v. *Burgwyn*, 84 N. C., 560.

It is well settled that when insolvency is relied upon to rebut the presumption, the creditor must show that it existed during the entire statutory period next after the maturity of the debt. *Grant* v. *Burgwyn*, *supra; McKinder* v. *Littlejohn*, 4 Ired., 198; *Walker* v. *Wright*, 2 Jones, 156.

Applying these principles to the case before us, it is clear that the plaintiff has failed to rebut the presumption of payment arising from his long inaction. Assuming that the statute did not commence to run until the 1st of January, 1870, we have a period of seventeen years in which the plaintiff has made no effort whatever to enforce the payment of his claim. The only evidence as to the insolvency of the defendant during all of these years is contained in a letter written by him on March 23d, 1871, and addressed to "Dear Charles." It does not appear that this person is in any way connected with this debt, nor does the letter so identify the indebtedness therein mentioned with the bond sued upon as to warrant us in holding that it amounts to an acknowledgment. Treating it, however, either as an acknowledgment, or more properly as evidence merely of insolvency at its date, there is no testimony as to the continuance of such insolvency during the succeeding sixteen years.

It needs not the citation of authority to show that this proof is insufficient to repel the presumption of payment. The learned counsel, however, insist that the non-residence of the defendant should have been submitted to the jury. In *Kline* v. *Kline*, 20 Pa. St., 503, WOODARD, J., in speaking of this position, says that "if it had ever been held to be, it might be doubted whether the rule ought not to be abrogated now, since the facilities of intercommunication have multipled so wonderfully in all directions. But such a rule has never been established. The States of this confederacy are not foreign countries in respect to each other. We have a common federative head and a common constitution, which secures to the citizens of each State all the privileges and immunities of citizens of the several States. The tribunals of Ohio are as open to the citizen of Pennsylvania as his own Courts, and if he will not avail himself of his privileges he may not take advantage of his own inaction to rebut a statutory presumption of law."

In the cases cited by the plaintiff (*Armfield* v. *Moore*, 97 N. C., 34, and *Lilly* v. *Wooley*, 94 N. C., 412) there are suggestions as to the hardship of requiring a creditor to resort to a distant forum in order to collect his debt, but the statute of presumption was not then under consideration, and the remarks of the Justices who delivered the opinions, cannot therefore be regarded as authority upon the question before us.

Especially is this true when we consider that this Court has several times emphatically decided that non-residence alone is not sufficient to rebut the presumption. In *Campbell* v. *Brown*, 86 N. C., 376, RUFFIN, J., in delivering the opinion of the Court, said that the presumption of payment is one "that may be rebutted by proof of circumstances which raise a stronger counter-presumption, and, as was said in *McKinder* v. *Littlejohn*, 4 Ired., 198, evidence of a change of residence, or even distant residence, may be received for this purpose in aid of other evidence, such as the insolvency and general destitution of the debtor. But we know of no authority proceeding from this, or any other Court, for saying that a mere change of residence is of itself sufficient wholly to prevent the presumption which the law, by an intendment of its own, raises from the lapse of the prescribed number of years, without something having been done on the part of the creditor to enforce the satisfaction of his demand."

Although non-residence is competent, when connected with other circumstances tending to rebut the presumption, we cannot hold that it is sufficient when the only circumstance with which it is to be considered is the insolvency of the debtor for only the second year of the statutory period, leaving the preceding year, and the succeeding sixteen years, wholly unaccounted for.

The furthest that the Court has ever gone in this direction was in *McKinder* v. *Littlejohn*, 4 Ired., 198 There was evidence of the continuous insolvency of the debtor for twenty-five years, with the exception of eighteen months during the first seven or eight years, when it was shown that the defendant had property. During this time he was a non-resident of this State The Court said that "the circumstance of distance between the debtor and the creditor might, we think, be left to the jury, with the fact of a *continuous* insolvency during the residue of the twenty years, as some evidence that the debtor did not pay the debt during that small space of time. * * * The distance is material only as preventing the possession of property by the debtor for but a short period from counteracting the effect of insolvency as a circumstance repelling the presumption of payment. For if the debtor, living more than a thousand miles from the creditor, and in a situation between which and the place of the creditor's residence there was but little communication, should have had in possession property of value to pay the debt but for a very short time, so that the jury should think the creditor did not know of it, and could not get payment out of that property, it might be regarded as being substantially a continued insolvency, especially where, as here, the debtor seems barely to have had possession of property without its appearing how he got it and whether he had paid for it." It will be observed how cautious the Court is in giving any efficacy to such evidence, even in a case of long and continued insolvency, and the decision is put upon the ground that, owing to the distance, the plaintiff might not have known of the possession of property by the defendant.

How different is the case before us. Here, as we have said, the only proof of insolvency are the declarations in the letter of 1871, from which it plainly appears that the debtor is in possession of considerable landed property on which, he complains, there was *only* raised a crop of $5,000 the previous year. He calls it "my property," and frankly admits that he has had it so "fixed" that his creditors cannot disturb it. He has a suit in the Supreme Court and thinks that he "will recover half after a while." He has "a full supply of hands" "cultivating all the plantation," and hopes to make a good crop. He is giving his whole attention to it. Surely this does not indicate such poverty as to render it impossible for the defendant to pay, nor are the circumstances of such a nature as to discourage the plaintiff from a vigorous effort to subject the property to the payment of his claim.

In McKinder's case, the testimony, as we have remarked, was considered because it was improbable that the creditor knew of his debtor possessing property for the short period of eighteen months. In our case the creditor is actually informed by the debtor of his possession of a large property, and of his effort to prevent his creditors from reaching it, thus furnishing to the creditor valuable written testimony which he could use in subjecting the property to the satisfaction of his claim. It would, we think, be stretching the principle of *McKinder* v. *Littlejohn* very far to hold that such testimony is legally sufficient to go to the jury.

The plaintiff further contends that the statute does not run during the absence of the debtor from the State, and for this he relies upon *Summerlin* v. *Cowles*, 101 N. C., 473. In that case, the late Chief Justice remarked that, while there is no saving clause in the statute of presumption (Rev. Code, ch. 65, § 9), "yet, when it is adopted as a measure of time in which an action must be brought, it must, by reason of the same analogy, be accompanied with the qualification attaching to all limitations and mentioned in section 9 preceding." This suggestion on the part of the learned Chief Justice was unnecessary to the decision of the case, as it will be observed that the defendant relied upon the statute of limitations. This will more particularly appear by an examination of the papers on file in this Court.

We cannot consider the suggestion as authority, as it is entirely opposed to many cases in which the point was directly presented and distinctly decided to the contrary. *Headen* v. *Womack*, 88 N. C., 468; *Houck* v. *Adams*, 98 N. C., 519; *Hamlin* v. *Mebane*, 1 Jones' Eq., 18; *Hodges* v. *Council*, 86 N. C., 181; *Campbell* v. *Brown*, 86 N. C., 376. His Honor was correct in ruling that the testimony offered was not legally sufficient to rebut the presumption of payment.

We are also of opinion that Dr. Willis Alston was properly excluded as a witness for the plaintiff. He was interested in the result of the action, and falls directly within the inhibition of *The Code*, § 580. It is urged that this section does not apply because the defendant pleaded both the statute and actual payment. Where actual payment is pleaded and "relied" upon, the statutory prohibition has no application, but merely pleading actual payment does not prevent its operation. Here the defendant offered no testimony whatever, and "relied" solely on the presumption of payment arising from the lapse of time. It is very plain that our case is not within the exception. *Brown* v. *Cooper*, 89 N. C., 238.

Upon a review of the whole case, we are unable to find any error.

Affirmed.

W. E. BRITT et al. v. J. P. HARRELL, et al.

Chattel Mortgage—Equitable Lien—Equitable Assignment.

1. The words "we promise to pay to L. & B., out of the proceeds of certain railroad ties we have now in Hertford County, amounting to forty-two hundred, the sum of a hundred and thirty-two dollars, * * * and authorize the purchaser to retain that amount for them," contained in a promissory note, are not sufficient to constitute it a chattel mortgage, or an equitable lien, though duly proved and registered.
2. Nor is such instrument a sufficient equitable assignment of the ties, or the proceeds thereof, to the payment of the debt.

This was a CIVIL ACTION, tried before *Boykin, J.*, at Spring Term, 1889, of the Superior Court of Hertford County.

The plaintiffs allege, in substance, that in February, 1888, Dunn & Kitchen were engaged, in the county of Hertford, in getting railroad ties for market, and while so engaged the plaintiffs made advances to them in money and supplies to a large amount; that on the 13th day of February, 1888, "said Dunn & Kitchen were indebted to said Britt & Lawrence in the sum of $132.26, balance on said supplies," for which they executed their promissory note, in words and figures as follows:

"$132.26. WINTON, N. C., February, 13, 1888.

"We promise to pay Lawrence & Britt, out of the proceeds of certain railroad ties we now have in Hertford County, amounting to about forty-two hundred, the sum of one hundred and thirty-two $\frac{26}{100}$ dollars, with interest thereon from December 3d, 1887, to be paid as follows: First deducting eighteen hundred ties for O. H. Perry from the first amount hauled, then we will pay Lawrence & Britt, out of the remainder, at the rate of ten cents a piece for all delivered to transportation until they are paid in full, and authorize the purchaser to retain said amount for them.

"Witness our hands, this the 13th day of February, 1888.

"Witness: DUNN & KITCHEN.

"R. W. WINBORNE."

The said paper-writing was duly proved and registered in Hertford County on the 14th of February, 1888, and "thereafter Dunn & Kitchen did not cut and hew any more ties in said county, and said 4,200 ties were all that they had in said county at that time"; that about the 1st of April, 1888, Dunn & Kitchen delivered 800 ties for transportation, and left the remainder in the woods where they were cut; that about June 1st, 1888, Dunn & Kitchen abandoned the State, or kept themselves concealed therein to avoid service of summons, and with intent to defraud their creditors; and thereupon J. J. Jordan and S. J. Holloman, upon whose lands the ties were cut, sued out an attachment against them, and, under proceedings therein, the remainder of said ties, about 3,400, were sold at public sale, and the defendant Harrell became the purchaser; the ties so purchased were those owned by Dunn & Kitchen, in Hertford County, at the time of the execution by them of the said paper-writing, and embraced within its provisions; the defendants J. P. Harrell and A. C. Vann hauled to a point on the banks of the Chowan River, for transportation, 2,000 or more of the ties. No part of said note has ever been paid, and the plaintiffs allege that they have an equitable lien to have said ties subjected to the payment thereof. Dunn & Kitchen are totally insolvent, as is also Harrell, who is threatening to sell and remove said ties, and, if permitted to do so, the plaintiffs will sustain irreparable loss. Harrell purchased with full knowledge of the claim of plaintiffs, and they ask that he be restrained," &c.

A restraining order was issued, and the defendants filed thereafter the following demurrer:

"The defendants demur to the plaintiffs' complaint in this action, because it fails to state facts sufficient to constitute a cause of action, in that—

"1. It does not appear that the plaintiffs have any lien, equitable or otherwise, upon the railroad ties described in the complaint.

"2. It does not appear that the defendants, or either of them, are under any legal obligation whatever to the plaintiffs."

Judgment was rendered sustaining the demurrer, and the plaintiffs appealed.

Mr. B. B. Winborne, for plaintiffs.
Mr. W. D. Pruden, for defendants.

DAVIS, J.—after stating the case: The sole question presented in this case is, Was the paper executed by Dunn & Kitchen a chattel mortgage? Was it sufficient to constitute a lien, legal or equitable, in favor of the plaintiffs against a purchaser at a sale made by the Sheriff under execution?

Whether the instrument, in itself, is a mortgage, is a question of law to be determined by the Court. *Comron* v. *Standland*, 103, N. C., 207; Jones on Chattel Mortgages, § 18.

In the case before us there is nothing in the paper to indicate that Lawrence & Britt shall "have a lien" upon the railroad ties. Nothing found therein imports a conveyance of the title to the ties. No authority is given to sell the property upon default of payment, or in any way to dispose of or control it. There is nothing to bring it within the definition of a legal mortgage. Jones on Chattel Mortgages, § 1, *et seq.*

But it is insisted that it is an equitable assignment or appropriation of the ties to the payment of this debt, and the purchaser at the Sheriff's sale had notice. We do not think it can be so considered. It was only a promise by Dunn & Kitchen to pay money, with the additional promise that they would pay it "out of the proceeds" of the ties.

While "no particular form is necessary to constitute a mortgage," yet the words must "clearly indicate the creation of a lien, specify the debt to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect." "The statement that the creditor is to have a lien, and that on default he may take possession and sell, * * * sufficiently discloses the intent." *Harris* v. *Jones*, 83 N. C., 317, and cases cited. The instrument under review gives the plaintiff, in no event, authority to take possession and sell the ties.

A debtor says to his creditor: "I will send cotton which I have in my gin to my commission merchant and pay your debt out of its proceeds, or I will authorize him to retain it for you." The debtor sends the cotton off and sells it, or it is seized under execution and sold by the Sheriff. Would the creditor, in such a case, even though he had registered the *promises* of his debtor, have a right, in law or equity, to follow the property and have it applied to the payment of his debt? However it might be as between the parties, one making the promises and the other relying on them, in the absence of any charge or circumstances of fraud or collusion to cheat the debtor, as to third persons, such an agreement could, in no sense, be regarded or treated as a mortgage of the cotton.

The plaintiffs say: "This lien was not divested by the attachment in favor of Jordan and Holloman and the sale thereunder to the defendant," and for this, the case of *Lake* v. *Doud*, 10 Ohio, 415, is cited. The plaintiff's misfortune is that, in this case, there was no lien. In the case of *Lake* v. *Doud*, the mortgage had been drawn properly, and was registered, but it was improperly attested; was not therefore a "legal mortgage." The complaint charged that the defendants (whose relations to each other are set out) combined to cheat and defraud him, and the Court, after setting forth at great length facts to show the fraudulent character of the transaction, were "irresistibly led to the conclusion" that it was fraudulent and void, and held that though the plaintiff had no legal mortgage, yet he had an equitable mortgage, which could be enforced.

There is no allegation or pretence of any combination and collusion between the execution creditors, the purchasers at the Sheriff's sale, and the debtors in the present case, to cheat and defraud the plaintiffs, and the case is unlike that of *Lake* v. *Doud*.

The plaintiffs had nothing in addition to their note but the *promises* of Dunn & Kitchen that they would pay "out of the proceeds of certain railroad ties," &c., and "authorize the purchaser to retain" the amount of their debts for them; and these promises, without a transfer of the title to the ties, as security, were worth no more, it seems, than the promise to pay the money.

Affirmed.

W. F. KORNEGAY v. A. W. STYRON et al.

Lien—Waiver—Estoppel.

1. In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties and agreed to accept three notes secured by a second mortgage on the vessel as security: *Held*, such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser.

2. The fact that the notes and mortgage were never, in fact, executed pursuant to agreement does not vitiate the waiver, it not appearing that their execution was a condition precedent thereto.

This was a CIVIL ACTION, tried at February Term, 1890, of BEAUFORT Superior Court, before *Boykin, J.*

This action was brought by the plaintiff, as assignee of W. F. Kornegay & Co., against the defendants Styron & Duncan, the builders of the vessel presently to be mentioned, and the defendant Brown, who afterwards purchased that vessel, claiming mediately under his co-defendants.

The plaintiff alleges in his complaint, among other things, that he manufactured and sold to said Styron & Duncan, for a price specified, "a marine boiler, * * * to be used in completing, equipping, furnishing and fitting out a certain steamboat named 'Margie,' which said defendants were then engaged in building at Washington, in the county of Beaufort," &c. And further—

"5. That within the time prescribed by law, the plaintiff filed in the office of the Clerk of Superior Court of said county a notice of lien for said claim upon said steamboat for balance then due, to-wit, eight hundred dollars, with interest from February 3d, 1885.

"6. That the defendant C. M. Brown is in possession of said steamboat, claiming it under a sale under a mortgage given by the said Styron & Duncan, as the plaintiff is informed and believes."

The defendants, in their several answers, deny that the plaintiff ever acquired any lien upon the vessel as claimed by him, or at all, and the defendants Styron & Duncan among other things, allege—

"4. That on or about June 11th, 1884, these defendants, with the consent and affirmance of plaintiff, sold and conveyed said steamer to the New Berne, Beaufort and Onslow Inland Coasting Company, a corporation of Carteret County,

N. C.; that at said sale and transfer, said plaintiff agreed, with the officers of said corporation, to accept its notes, to be secured by a second mortgage on said steamer for said sum claimed by him.

"5. That thereby these defendants were individually released from said obligation by plaintiff.

"6. That they adopt sections 3, 5, 6, 7. 8, 9, 10 and 11 of the answer of their co defendant C. M. Brown, and make the said sections a part of this their answer."

The defendant Brown, in his answer alleges, among other things, as follows:

"For third defence, this defendant says:

"7. That on the 11th day of June, 1884, or thereabouts, the said Styron & Duncan sold, assigned and conveyed their respective shares and interests, being one-half each, in said steamer to the New Berne, Beaufort and Onslow Inland Coasting Company, a corporation in the county of Carteret, North Carolina, by 'Bills of Sale' for said vessel.

"8. The said corporation executed its notes and mortgages to said A. W. Styron and one said Thomas Duncan, conveying said steamer to secure its notes for the purchase money, or unpaid part thereof, for said steamer; that on June 17th, 1884, before said notes were due, two of said notes, for $1,307 01 each, were assigned to defendant for value, one by defendant Styron and one by defendant Duncan, who caused said notes to be preferred in the said mortgages. That under the sale under these mortgages this defendant purchased both halves, or the whole, of said steamer. That when said notes were assigned to him, and at the said sale, this defendant had no knowledge of any lien or claim of plaintiff on said steamer, and purchased said notes before they were due, and also said steamer, without any knowledge of said claim or lien, and for a full and valuable consideration.

"9. That defendant is informed, believes and alleges, that the plaintiff consented to the sale, hereinbefore set forth, to said New Berne, Beaufort and Onslow Inland Coasting Company, and thereby waived any alleged lien he may have claimed upon said steamer.

"10 That defendant is informed, believes and alleges that said plaintiff not only consented to said sale to said corporation, but agreed at time of said sale with the said corporation to accept the notes of said corporation for the amount claimed by him.

"11. That defendant is informed, believes and alleges that said plaintiff knew of the intended execution of said first mortgages herein set forth, and under which defendant purchased and made no objection to the execution thereof, and, in fact and law, consented to the same"

The plaintiff demanded judgment—

"1. For eight hundred dollars, with interest thereon from the 5th day of July, 1884.

"2. For costs

"3. That said judgment be declared a lien upon said steamboat 'Margie,' and that said steamboat be sold to satisfy the same, and

"4 For such other relief as he may be entitled to."

Among other issues, the Court submitted the following to the jury, to which they responded as indicated at the end of each of them:

"1. Did the firm of W. F. Kornegay & Co. agree to accept from the transportation company its notes secured by second mortgage upon the steamer 'Margie,' in satisfaction of their debts? Ans. Yes

"2. Were such notes and mortgages executed and delivered to the said firm in pursuance of such agreement? Ans. No.

"3. Was the transportation company able to execute such notes and to secure the same by mortgage upon the steamboat? Ans. Yes.

"9. Did the plaintiff assent to the sale of the steamer 'Margie' to the company at or before the sale or the filing of the lien? Ans. Yes.

"10. Is the company now able to execute its notes and secure same by mortgage upon the steamer for which the boiler was furnished? Ans No."

In lieu of the ninth issue, the plaintiff requested the Court to submit the following: "Did the plaintiff, or the firm of W. F. Kornegay, consent to the sale of the steamer 'Margie' by Styron & Duncan to the New Berne, Beaufort and Onslow Inland Coasting Company at or before the sale?" The Court declined to submit this issue, and plaintiff excepted.

The Court gave judgment in favor of the plaintiff, and against the defendants Styron & Duncan, for the debt ascertained to be due, and declined to declare the same to be a lien on the steamboat mentioned and direct a sale thereof, as demanded by the plaintiff. The latter, having excepted, appealed.

Mr. C. F. Warren, for plaintiff.
Messrs. W. B. Rodman, Jr., and *J. H. Small*, for defendants.

MERRIMON, C. J.—after stating the case: The first exception cannot be sustained. The ninth issue submitted to the jury served substantially the same purpose as that proposed by the plaintiff in lieu of it would have done if it had been submitted. "Consent" and "assent" are not synonymous terms, but the result would be the same in this case, whether the plaintiff consented or assented to the sale of the vessel to the Coasting Company named. Besides, taking the first issue submitted in connection with the pleadings, the jury found, in substance, that the plaintiff consented to such sale. He was a member of the firm of W. F. Kornegay & Co., and is their assignee of the cause of action alleged in the complaint.

If it be granted, as the plaintiff contends, that he perfected a lien in favor of his debt, as allowed by the statute (*The Code*, §§ 1781–1784), upon the vessel which he seeks to subject to its payment, we think he waived and abandoned such lien in favor of the Coasting Company mentioned, and all persons claiming under and through it, and he cannot now have benefit of it.

The defendants allege expressly in their answers that the plaintiff not only consented to a sale of the vessel to that company, but agreed at the time of the sale to accept its notes, secured by a second mortgage of the property, for the amount due him from the defendants Styron and Duncan; and the jury find, by their verdict, that he did so agree, and further, that he assented to the sale when made. It was clearly competent for the plaintiff thus to abandon his lien; and, having done so, he cannot, in good conscience, insist upon enforcing it—he is estopped in equity from doing so.

It is no sufficient answer to say that the notes and second mortgage of the Coasting Company were not executed. It agreed, upon a sufficient consideration, with the plaintiff to execute them, and as it failed to do so—for what reason does not appear—he might have had his remedy against it. It does not appear that the execution of them was made a consideration precedent to the waiver, and it is found, as a fact, that the plaintiff assented to the sale It may be that he unwisely agreed to abandon his lien—that he made a bad bargain in doing so—but if so, this was his misfortune or his folly; it is no reason why he should be allowed to re-assert his lien to the prejudice of innocent purchasers, nor will a court of equity help or allow him to do so.

Affirmed.

B. B. WINBORNE v. WILLIAM DOWNING et al.

Deeds—Construction—Husband and Wife—Constitution—Heirs—Warranty—Fee-simple.

1. Prior to the present Constitution, a deed by husband to wife, founded on a valuable consideration, was upheld in equity.
2. A deed which conveyed "to C. D. a certain parcel of land" (describing it) contained a clause as follows: "And I do further agree to warrant and defend the title of the same to her, the said C. D., her heirs or assigns forever," conveyed a fee-simple estate.
3. Unless this construction is given, the words "to her heirs," and the term "forever," would be meaningless.
4. Disorderly arrangement and punctuation may be disregarded when necessary to get the intention of the parties.

This was a CIVIL ACTION, tried at Fall Term, 1889, of HERTFORD Superior Court, before *Brown, J.*, to recover the land specified in the complaint. It appears that the defendants William Downing and Celia Downing were husband and wife before and after the 1st day of October, 1861; that on that day the former undertook and purported to execute to his said wife a deed, conveying to her the land in controversy, and the following is a copy of such parts thereof as need be reported here:

"That, for and in consideration of her interest in the tract of land known as the Harrell Farm, it being the same whereon the late James Harrell lived and died, I do, by these presents, exchange and convey unto the said Celia Downing a certain piece or parcel of land, bought of James P. Howell, lying, situate and being in the county and State aforesaid, and containing, by actual survey, seventy-one acres and twelve poles, bounded as follows, &c., * * * with all and every improvement there belonging to him, the said William Downing; and I do further agree to warrant and defend the title of the same to her, the said Celia Downing, her heirs assigns, forever," &c.

The defendants demurred to the complaint, and assigned grounds of demurrer as follows:

"1. It appears that, at the time of plaintiff's purchase, the lands were owned in fee-simple by Celia Downing, by virtue of the deed from William Downing to her of October, 1861.

"2. That if the said land did not pass to the said Celia by virtue of that deed, then said lands were the property of William Downing at time of said sale. The said lands were worth less than $1,000—were the only lands, or interest in lands, owned by him. He was entitled by law to have his homestead allotted to him before said sale, and the same was not so allotted.

"3. That it appears that no title passed to the plaintiff, by virtue of said sale."

The Court sustained the demurrer, and gave judgment accordingly.

The plaintiffs, having excepted, appealed.

Mr. B. B. Winborne, for the plaintiff.
Mr. W. D. Pruden, for defendant (by brief).

MERRIMON, C. J.: The husband could not, anterior to the present Constitution, make a deed conveying real estate to his wife, valid *at law*, but it is properly conceded by the appellant that such a deed would be upheld in equity if the same were founded upon a valuable consideration. *Huntly* v. *Huntly*, 8 Ired. Eq., 250; *Garner* v. *Garner*, Busb. Eq., 1; *Walton* v. *Parish*, 95 N. C., 259.

The consideration of the deed in question from the defendant William Downing to his wife was a valuable one, and hence that deed must be upheld as sufficient and efficient against the plaintiff in this action, unless, as he contends, the deed conveyed to the wife but a life-estate in the land. He insists that, in that case, he is entitled to recover, because it appears that the wife died after the execution of the deed of the Sheriff to him, and before the bringing of this action; and because, further, the Sheriff's deed conveyed to him the reversion of the husband.

We think the deed to the wife mentioned was intended to, and did, in equity, convey to her the fee-simple estate in the land. It purports to convey the land and "to warrant and defend the title of the same to her, the said Celia Downing, her heirs and assigns forever." This clause of warranty as to "her heirs," and the term "forever," would be useless and meaningless, if it was intended that she should have but a life-estate. The purpose thus clearly appearing, the deed must be so interpreted as to effectuate that purpose, if there are apt words and phraseology in it that will allow of such interpretation.

There are such words. There are words of inheritance applicable to the wife, the bargainee in the deed, that have no sensible meaning or proper application otherwise. The deed is disorderly and informal; the clause of warranty and the *habendum* clause are confusedly placed together, but for this, the connection between the words "to her, the said Celia Downing, her heirs and assigns forever," would be orderly and appear to serve their proper purpose in conveying the fee. Thus applying them, the deed must be read thus: "with all and every improvement there belonging to him, the said William Downing, * * * to her, the said Celia Downing, her heirs or assigns forever." How the exact punctuation appears in the deed, or whether there is any at all, does not appear to us, but if need be, the punctuation will be disregarded in order to effectuate the purpose clearly appearing. There are numerous cases, very like the present one, that fully sustain the interpretation we have given the deed in question. *Bunn* v. *Wells*, 94 N. C., 67; *Ricks* v. *Pulliam*, 94 N. C., 225; *Graybeal* v. *Davis*, 95 N. C., 508; *Hicks* v. *Bullock*, 96 N. C., 164.

It thus appears that the defendant William Downing had no interest in the land the Sheriff undertook and purported to sell and convey to the plaintiff at the time of the supposed sale, and therefore the latter has no title thereto and is not entitled to recover.

Affirmed.

J. C. NIXON v. J. C. McKINNEY and THOMAS B. ROLLINS.

Evidence—Intent—Fraud—Transaction with Deceased Persons—General Character.

1. Upon the trial of an action involving the *bona fides* of a deed conveying land, it was in evidence that both parties claimed under one C.—the plaintiff through execution sale, the defendant by private sale. C. died pending suit, but his deposition, taken on behalf of the defendant, was, without objection of the plaintiff, admitted, in which he testified in relation to the circumstances of the alleged fraudulent sale and conveyance of defendant: *Held*, that under the last clause of §590, *The Code*, the defendant became a competent witness in his own behalf, in respect to the same transaction.
2. While evidence of the intent of a party to a deed is never competent for the purpose of changing its obvious meaning, or adding new provisions when its meaning is clear, nevertheless where it is material to ascertain whether a grantor acted in good faith in executing a deed, or the motives of the grantee in taking benefit under it, the evidence of such grantor or grantee is competent upon the question of intent.
3. Particular facts are inadmissible to prove general character.

This was an Action for the Possession of Land, brought against the defendant McKinney, tenant in possession, and defended by his landlord, T. B. Rollins. It was tried at November Term, 1889, of the Superior Court of HARNETT County, before *Armfield, J.*

The issues and responses were:

1. Was the deed from C. H. Cofield to T. B. Rollins made to hinder, delay, or defraud creditors of C. H. Cofield? Ans. Yes.

2. Was T. B. Rollins a purchaser of the land in controversy for value, and without notice of any fraud in said purchase? Ans. Yes.

3. Is plaintiff the owner in fee of said land and entitled to the possession thereof? Ans. No.

4. What damage has plaintiff sustained by reason of the detention of said land by defendant? Ans. None.

The plaintiff and defendant Rollins both claimed title to the *locus in quo* under one C. H. Cofield—the plaintiff by mesne conveyances from the purchaser at an execution sale under a judgment in favor of F. F. Blalock against Cofield, which was obtained at Spring Term, 1882, of Harnett Superior Court, and docketed therein February 24, 1882. Summons issued in the Blalock suit January 13, 1880, and was served on defendant in that case February 4, 1880; execution issued on the Blalock judgment 28th of February, 1882, under which the Sheriff of Harnett County levied on the *locus in quo* and returned that execution without sale. An alias execution was issued under which, on February 21, 1883, the Sheriff sold, when W. E. Murchison became the purchaser, and transferred his bid to F. McK. Murchison, to whom the Sheriff of Harnett County executed a deed. F. McK. Murchison, prior to the commencement of this action, conveyed a deed for the *locus in quo* to the plaintiff Nixon.

The defendant Rollins claimed title under Cofield by a deed to him, dated May 1, 1880, and registered June 24, 1880, prior to the docketing of the Blalock judgment against

Cofield, and this deed the plaintiff read in evidence before resting his case.

The plaintiff, after introducing the judgment and execution in the Blalock suit, under which the *locus in quo* was sold and purchased by his grantor, offered both parol and documentary evidence tending to prove that on May 1st, 1880, Cofield was insolvent, and tending to attack the deed from him to the defendant Rollins as being fraudulent and intended to hinder, delay and defraud the creditors of Cofield. The plaintiff also offered evidence that the defendant Rollins was, at the time of taking the deed from Cofield, his son-in-law, and tending to show that he had opportunities of knowing his insolvent condition; and that the financial embarrassment of Cofield became publicly known in Harnett County before the execution of the deed to Rollins.

The defendant claimed to be a *bona fide* purchaser for value and without notice of any fraudulent intent on the part of Cofield, and offered evidence tending to establish this defence; and after plaintiff had introduced his evidence and rested, he introduced the deposition of Cofield—who died since the commencement of this action—which had been taken in behalf of the defendant. In this deposition Cofield testified: "About one year after I conveyed the 175 acres to T. B. Rollins I sold to him a 52-acre tract for sixty dollars, and received the cash from T. B. Rollins, and said sale was not made in fraud of Mrs. Fannie Blalock or any other person, but was *bona fide* and for full and valuable consideration, it being land of very inferior character, being very hilly, poorly timbered, light and inferior soil, and, according to my opinion, it sold for its value, and that it would not have brought more at public sale for cash."

Plaintiff objected to the reading of the deposition to the jury, because the witness undertakes to give in evidence conclusions of law, such as saying the deed to Rollins was "*bona* *fide*, and not made in fraud of Mrs. Blalock or any other person," &c., whereas it was only competent for him to speak of the facts from which the character of the transaction might be inferred by the jury. Objection was overruled, and the whole of the deposition was read to the jury, and plaintiff excepted.

The defendant was introduced as a witness in his own behalf, and plaintiff objected to his being allowed to testify as to any transaction or communication between him and Cofield. The Court overruled plaintiff's objection, and Rollins testified, among other things, as follows:

"I am a son-in-law of C. H. Cofield. I gave him sixty dollars cash for the land (*locus in quo*). I think I gave full value. It was a real transaction."

Rollins was further permitted, notwithstanding plaintiff's objection, to testify as to his own intention as follows:

"It was not my intention to defraud anybody."

Rollins also testified that he had no knowledge of any fraud on the part of Cofield, and no knowledge of the Blalock suit until during its pendency, and after he had purchased this land; that he resided in Wake County at the time, and he allowed Cofield to remain upon the land because he was old and poor and was his father-in-law, but there was no prior stipulation or arrangement to that effect. There was no agreement for rent, and Cofield paid none.

There was testimony of other witnesses that $60 was a fair price for the land.

Plaintiff excepted.

On cross-examination, a witness for plaintiff, in response to questions put to witness by defendant's counsel, testified, without objection, that Cofield was a member of the Legislature, County Commissioner and a Director in the Penitentiary Board, and stood very high.

On re-direct examination of this witness, the plaintiff offered to prove in reply to defendant's cross-examination that, on a former trial between Nixon, the plaintiff, and Cofield and defendant Rollins, about another tract of land, it was testified that said Cofield had forged a deed.

Defendant objected. The Court sustained the objection, and plaintiff excepted.

This witness, however, was allowed to state in response to a question on the re-direct examination, that he did not think that Cofield possessed that high character at the latter part of his life.

There was no exception to the charge. After verdict, plaintiff moved for a new trial on the foregoing exceptions to evidence. Rule for new trial discharged. Judgment was rendered in favor of defendant for costs, from which plaintiff appealed.

Messrs. W. A. Guthrie and *W. E. Murchison*, for the plaintiff.

Mr. R. P. Buxton, for defendant.

AVERY, J.—after stating the facts: It is not necessary to pass upon the exception to so much of the deposition of C. H. Cofield, the bargainor in the deed alleged to be fraudulent, as bears upon the question of his good faith in executing it. The finding of the jury in response to the first issue, that it was made to defraud his creditors, eliminates from this discussion the competency of testimony that was palpably harmless unless the answer to that issue had been "No."

The deposition of Cofield was offered for the defendants, and omitting all that was the subject of exception, his testimony, that he sold the land to T. B. Rollins for sixty dollars, which was a "full and fair consideration," was allowed to go to the jury without objection. He was the acknowledged common source of title. The defendant Rollins claimed from him directly by virtue of the deed of May 1st, 1880, while the plaintiff claimed through mesne conveyances from a purchaser at Sheriff's sale, made February 21st, 1883, under a judgment rendered against Cofield at the Spring Term, 1882, of the Superior Court of Harnett County. The objection, therefore, to allowing the defendant Rollins to testify, at a subsequent stage of the trial, that he paid Cofield sixty dollars for the land, and that was full value, is not tenable, because "the testimony * * * of the deceased person" (Cofield) had been "given in evidence concerning the same transaction" (the price paid and its inadequacy), and this case comes within the exception contained in the last clause of §590 of *The Code.*

Testimony as to the private intention of a person when he executes a deed, is never competent for the purpose of changing its natural and obvious meaning, or adding new provisions, when its meaning is clear; but an ambiguous instrument can be construed by a parol testimony that does not contradict it 2 Whart. on Ev., §§935 to 939. Where, however, it is material to know whether a grantor acted in good faith in making a deed, or the motives of the grantee in taking the benefit of the conveyance, it is now an established rule that either may testify as to his intent in the transaction. Usually, circumstances that take a wide range, are deemed admissible to throw suspicion upon such transactions and impeach the integrity of the parties to them, and if a witness is competent to speak at all, his mouth cannot be sealed as to a question of which he has peculiar knowledge, and upon which the whole case depends. The rule has been laid down as a general one, applicable alike in civil and criminal cases, that a party will be allowed to testify, whenever his intent is material, subject to the exception already stated, that the evidence is not admissible, to vary the terms of a written instrument by which he is bound. Whart. on Ev., §§33, 482, 935; *Bedell* v. *Chase,* 34 N. Y., 386; *Tracy* v. *McManus,* 38 N. Y., 257; Whart. on Hom., §520.

Particular facts are not admissible to prove the reputation of a party or witness to be either good or bad, for the reasons that they do not necessarily tend to establish a general character; that they confuse the jury by raising collateral issues, and especially that a party is presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specific charges against either without notice. *Peterson* v. *Morgan*, 116 Mass., 350; Whart. on Ev., § 56; *State* v. *Bullard*, 100 N. C., 486; *Barton* v. *Morphes*, 2 Dev., 520.

We think that there is no error in sustaining the objection to the testimony which plaintiff sought to elicit on the cross-examination of Grady, to the effect that some witness had testified on the trial of another action that C. H. Cofield had forged a deed. The evidence offered was not only incompetent upon the grounds just stated, but was amenable to the further objection that it was mere hearsay.

No error. Affirmed.

W. H. FORTESQUE et al. v. CHARLES CRAWFORD.

Vendor and Vendee — Statute Frauds — Contract — Evidence — Issues—Registration.

1. Parol evidence is not admissible to prove the terms of a verbal agreement to convey land when the party against whom it is asserted denies its existence.
2. Nor will a receipt containing no description of the land, but simply reciting that the money was the balance, or on account of land, be sufficient to admit parol evidence in support of the agreement.
3. A survey and plat of the land, made under the direction of the alleged vendor, containing no reference to the receipt alleged to have been given for the purchase-money, will not be sufficient to uphold the agreement; nor will parol evidence be received to connect it with such receipt.

4. Formerly all contracts, or memoranda purporting to be contracts, to convey lands, were required by *The Code*, §1245, to be registered before they could be admitted in evidence. *Quære*, whether this requirement is dispensed with by ch. 147, Laws 1885.

5. In an action to recover possession of land, the defendant set up a parol contract by the plaintiff to convey, which was denied: *Held*, that it was improper to submit to the jury an issue in respect to the making of such contract; and the only issues which ought to have been submitted were the amount of payments made by the vendee, and the value of the betterments placed by him on the property, and of the rents and profits with which he should be charged.

CIVIL ACTION, tried at February Term, 1889, of BEAUFORT Superior Court, *Boykin, J.*, presiding.

The plaintiffs sued to recover the possession of the tract of land described in their complaint.

The defendant admitted he was in possession, but in resistance to plaintiffs' demand set up a parol contract between himself and the ancestor of the plaintiffs, whe eby the latter agreed to sell and convey the land to the former for the sum of one hundred and twenty-five dollars; that, by virtue of this agreement, he (defendant) had entered, made improvements and paid the greater portion of the purchase-money. He produced in evidence—the plaintiffs objecting—the receipts and plat of the survey set out and referred to in the opinion of the Court, and demanded judgment that the plaintiffs, upon payment of any balance which might be found due upon the contract of sale, be directed to convey; or, if he was not entitled to such conveyance, that the amount he had paid thereon, and the value of the improvements he had made, be ascertained and declared a lien, &c.

The issues submitted by the Court—the plaintiffs excepting—with the responses thereto, were:

1. Did Gilbert Hale contract and agree in 1872 or 1873 to convey to the defendant the land described in the complaint, and did he have the same surveyed, marked and defined, and

put the description thereof in writing, and has the defendant been in possession under said contract up to the beginning of this action? Answer, "Yes."

2. Did Gilbert Hale execute and deliver to the defendant the paper-writing set forth in the answer? Answer, "Yes."

3 What amount did the defendant agree to pay Gilbert Hale for the land in controversy? Answer, "$125."

4 What amount, if any, is due the said Hale on account of the purchase-money for the land? Answer, "$10."

Thereupon the Court adjudged that the plaintiffs, upon the payment of the balance found to be due from the defendant, should convey to him the lands in controversy, from which plaintiffs appealed.

Messrs. J. H. Small and *W. B. Rodman, Jr.*, for the plaintiffs.
Mr. Charles F. Warren, for the defendant.

CLARK, J.: The issues arise upon the pleadings. *The Code*, §391; *Wright* v. *Cain*, 93 N. C., 296; *Patton* v. *Railroad*, 96 N. C., 455. There are no allegations in the pleadings which suggest the matter set out in the first issue, and an issue cannot be raised by evidential facts. *Miller* v. *Miller*, 89 N. C., 209. It was error to submit it to the jury.

The defendant alleges in his answer that, "Gilbert Hale, ancestor of plaintiffs, in 1874 contracted, *by parol*, to sell said land to him for $125," and that he made sundry payments and took therefor the receipts which are set out in the answer. All this is denied by plaintiff in his replication. Parol testimony was incompetent to prove the alleged agreement. *Holler* v. *Richards*, 102, N. C., 545. The contract alleged in the answer being denied, the defendant must produce legal evidence thereof, and an agreement to convey land cannot be shown by parol proof. *Allen* v. *Chambers*, 4 Ired. Eq., 125; *Gulley* v. *Macy*, 84 N. C., 434; *Bonham* v. *Craig*, 80 N. C., 224. As the law requires such contract to be in writing, the writing is not only the best, but the only admissible evidence. *Morrison* v. *Baker*, 81 N. C., 76.

The defendant offered the following paper-writings, which were set out in the answer. To their admission in evidence the plaintiffs excepted:

"CHARLES CRAWFORD.

Land	$125 00
Paid	61 58
Balance due	$ 63 42

"GILBERT HALE.

"January 1st, 1875."

"$10.68.

"Received of Charles Crawford, ten dollars and sixty-eight cents on account of his land, balance due him in settlement to this date. GILBERT HALE.

"March 23d, 1876."

These receipts were too vague and indefinite to admit parol testimony to locate the land. *Breaid* v. *Munger*, 88 N. C., 297; *Plummer* v. *Owens*, Busb. Eq., 254; *Capps* v. *Holt*, 5 Jones Eq., 153; *Murdock* v. *Anderson*, 4 Jones Eq. 77. The defendant endeavored to help out the insufficiency of the description by testimony of one Church Moore, which was that Hale had the lines run and chopped, and that Robinson, the surveyor, wrote out a description of the land by direction of Hale, signed the same and delivered it to Hale. This paper has been lost, but admitting proof of its contents as secondary evidence, it was a mere description of the land, with nothing on its face referring to, or connecting it with, the receipts above set out. To connect it with them by parol evidence is inadmissible. *Mayer* v. *Adrian*, 77 N. C., 83; 3 Pars. Cont., 17. If the receipts had been sufficient as memorandums of a contract to convey, it would have been error formerly to admit them in evidence, after objection, unless registered. *The Code*, § 1245; *White* v. *Holly*, 91 N. C., 67. Whether the same construction will be placed, as between the parties upon a contract to convey, under ch. 147, Acts 1885, which repeals and is substituted for *The Code*, § 1245, we need not now decide.

It was error not to charge the jury, as requested by the plaintiffs, "that the receipts introduced are too indefinite to admit parol testimony to locate the land mentioned therein, and they are no evidence of any contract to convey the land described in the complaint."

The plaintiffs, upon the issues found, tendered a judgment decreeing the plaintiffs to be the owners of the land; that the parol contract was not binding in law; that the defendant recover of the plaintiffs the sum of $115, being the amount found by the jury to have been paid by defendant on the purchase-money, and declaring the same a lien on the land, and that no execution issue for possession of the land till said sum is paid, and directing that rents and profits and value of betterments placed on the land be ascertained by a reference, and that the plaintiffs recover costs. The Court refused to sign this judgment in favor of the defendant, upon which plaintiffs again excepted.

The first issue was improperly submitted, and no legal evidence was offered in support of it. The defendant having pleaded a contract by parol, and plaintiff having denied any agreement, the only issues that could be submitted were as to the amount of the purchase-money paid by defendant, and the value of rents and profits and betterments. The judgment given should be set aside, and the plaintiffs are entitled to have judgment entered below, upon the verdict as rendered, of the tenor of that offered by them, except that defendants are entitled to interest upon the purchase-money, and that either party is entitled to have the issue as to rents and profits and value of betterments assessed by the jury, instead of by a referee, if they shall so choose. *The Code*, §§ 473–486; *Daniel* v. *Crumpler*, 75 N. C., 184.

Let this be certified that further proceedings be had in conformity with this opinion.

Error.

*ALBEMARLE LUMBER COMPANY v. THOMAS P. WILCOX, Sheriff.

Contract—Sale—Delivery—Damages.

1. When C. agrees to deliver on board plaintiff's schooners at certain landings lumber every month till, in the aggregate, it shall amount to 4,500,000 feet, with the further stipulation that such cargo shall be shipped from the landing to Elizabeth City at plaintiff's risk, and there measured, inspected and paid for: *Held*, that the plaintiff was entitled to recover two cargoes, so shipped, in an action of claim and delivery brought against a creditor of C., who had caused one cargo to be seized before, and the other after, being discharged at Elizabeth City, under a warrant of attachment issued in an action against C.
2. When property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or, by the terms of agreement, can be ascertained (as in our case by measurement and inspection), the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement until the quantity can be definitely determined, makes the sale complete.
3. Where there is an actual delivery, but no distinct agreement as to the exact price of an article, and no means provided of making it certain, the title does not pass, and, if the person consume the article so delivered to him, he becomes liable on an implied promise to pay the reasonable value, but not by force of the inchoate contract to sell.

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*Head-notes by Avery, J.

This was an ACTION brought to recover two cargoes of lumber seized by the defendant, who was Sheriff, by virtue of an attachment, and tried before *Brown, J.*, at the Fall Term, 1889, of the Superior Court of PASQUOTANK County. The testimony was as follows:

Calvin Conard testified as follows to contract, dated July 26, 1888: "I contracted in said writing to sell plaintiff 4,500,000 feet of lumber. In pursuance thereof, I shipped two cargoes last January, on schooners *Hill* and *Scud*, from Smith's Creek, Pamlico County, at mills of Harrison & Betts. The *Hill's* cargo was shipped January 29, 1889, and the *Scud's* on January 31, 1889. The entire lumber was delivered to plaintiff's company on board said vessels at Smith's Creek, and the delivery was there made. It was not measured there; settlement was to be made by measurement and inspection at Elizabeth City. I had taken the cut of Harrison & Betts' mills for 1889 at $7.50 per thousand feet. I received the bill of lading for the lumber about four days after shipment, and I at once endorsed the same to plaintiff. The plaintiff took the responsibility and risk of shipment from Smith's Creek to Elizabeth City. I am not sure that I received bill of lading before 12 M., February 4, 1889. But as soon as I received it I indorsed it and handed it to plaintiff's secretary. I had not received the payment from plaintiff when the attachments were levied. I was in Philadelphia when vessels were loaded at Smith's Creek."

Charles Bell testified: "The *Scud* arrived at Elizabeth City February 1, 1889, and the *Hill* on February 2, 1889. The lumber was put on the wharf of the Albemarle Lumber Company, the plaintiff. When the Sheriff levied the attachment, the lumber was in the *Hill*, the vessel then laying at the wharf. The *Scud* had been discharged. The *Hill* contained 53,629 feet in cargo, and the *Scud* 74,269 feet. I am plaintiff's agent at Elizabeth City; head office is in Philadelphia; lumber worth $8.50 per thousand feet. Plaintiff paid the freight—$1.40 per thousand feet. The lumber had not been counted or inspected when the attachment was levied."

T. P. Wilcox testified for defendant: "I seized the lumber under the attachment and papers in evidence at the date thereon stated (February 4, 1889) in the return, and the plaintiff took it under proceedings in claim and delivery in this cause."

Defendant introduced record of suit and attachment proceedings in favor of *Harrison & Betts* v. *Calvin Conard.*

The Court charged the jury that if there had been a *bona fide* and actual delivery of the lumber to the plaintiff under a contract of sale and for valuable consideration at Smith's Creek, and before attachment levied, then the plaintiff would acquire a title thereto, although it had not paid Conard for it; that if the jury believed the testimony, the plaintiff was entitled to a favorable response upon the issue.

The defendant asked the Court to charge the jury—

1. That if they believed the lumber sold by Calvin Conard to plaintiff was to be shipped by Conard, from Smith's Creek to Elizabeth City, and there counted, measured and inspected, and afterwards settlement to be made on basis of said account and measurement in cash, and the same had not been counted, inspected and settled for at the time the attachment was levied and seized by the defendant Sheriff, title did not pass to plaintiff, and it cannot recover.

Court refused, and defendant excepted.

2. That, upon all the facts being admitted, the title to said lumber did not pass to plaintiff, and plaintiff cannot recover.

Court refused, and defendant excepted.

The verdict was as follows, viz.:

1. Is the plaintiff the owner, and entitled to the possession, of the lumber described in complaint? Ans. Yes.

2. What was the value of said lumber? Ans. $1,087.13.

There was a verdict and judgment for plaintiff. Defendant excepted to the ruling of the Court refusing to charge as requested, and to the charge as made, and assigned the same as error, and appealed.

Agreement, made this the 26th day of July, 1888, by and between Calvin Conard, of this city and county of Philadelphia, Pa., of the first part, and the Albemarle Company, of Elizabeth City, N. C., of the second part: Witnesseth, that the said party of the first part hereby sells to the party of the second part, and the said party of the second part hereby purchases from the party of the first part, the following Log Run N. C. Lumber, culls and thin boards out, as hereinafter described, to be loaded at the respective mills, and delivered free on board vessels, viz.: Delivered free on board vessels at point of shipment, 1,500,000 feet "Smith's Creek" Lumber (Harrison & Betts), $7.50 per M.; 1,500,000 feet "New Berne" (Blades & Bro.), $7.75 per M.; 1,500,000 feet "Pamlico Lumber" Co., Blount Creek, $8 per M. All the above lumber to be counted and inspected at Elizabeth City, and settlement made on basis of said account, cash on delivery, less 2 per cent. It is further agreed, on the part of the party of the first part, that the purchase by the party of the second part of this lumber, will protect party of the second part, in so far as to guarantee that the lumber will be ready for shipment, proportionate quantity each month, between this date and January 1st, 1889, before which date all is to be ready for shipment. It is agreed by party of first part, that he will protect the party of second part in the matter of transportation of the above lumber from the respective mills to Elizabeth City by having vessels already chartered, if required by party of second part, to carry the said lumber, or any proportion required by party of second part, and at the lowest rates obtained by the said party of the first part, It is agreed that all the lumber from Pamlico Lumber Company mill is to be kiln-dried, while that from New Berne is to be also kiln-dried, or largely so; that from Smith's Creek is to be air-dried. It is agreed that all the lumber is to be in good shipping condition when delivered to the vessels at point of shipment.

In witness whereof, the said Calvin Conard has hereunto set his hand and seal, and the said Albemarle Lumber Company has affixed its corporate seal, the day and year first above written.

THE ALBEMARLE LUMBER CO.,
Calvin Conard, Vice-President.

Mr. J. H. Sawyer (by brief), for plaintiff.
Mr. C. W. Grandy, for defendant.

AVERY, J.—after stating the facts: We concur with the Judge below in the opinion that, if the testimony was true or was believed by the jury, the title to the lumber vested in the plaintiff when it was placed on board the Company's schooners at Smith's Landing.

"A sale is the transfer of the absolute or general property in a thing for money," or anything of value. When the property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or by the terms of the agreement can be ascertained (as in our case, by measurement and inspection at Elizabeth City), the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement till the quantity can be definitely determined, makes the sale complete. *Waldo* v. *Belcher*, 11 Ired., 609; *Morgan* v. *Perkins*, 1 Jones, 171; *Cohen* v. *Stewart*, 98 N. C., 97; *May* v. *Gentry*, 4 Dev. & Bat., 117. Where there is an actual delivery, but no distinct agreement as to the exact price of an article, and no means provided of making it certain, the title does not pass, and if the person consume the article so delivered to him, he becomes liable, upon an implied agreement, to pay its reasonable value, but not by force of the inchoate contract to sell. *Wittkowsky* v. *Wasson*, 71 N. C., 451; *Devane* v. *Fennell*, 2 Ired., 36. The lumber belonged to the plaintiff company, in any aspect of the testimony, when it was seized by the Sheriff under the warrant of attachment.

Affirmed.

*H. C. WHITEHURST v. ISRAEL PETTIPHER et al.

Appeal Reinstated—When.

When an appeal is dismissed for failure to comply with Rule 28 of the Rules of the Supreme Court, which requires a specified number of printed copies of the statement of the case on appeal to be filed, a reinstatement of the case on motion is not a matter of course, but will only be allowed *on good cause shown*. *Horton* v. *Green*, 104 N. C., 400, cited and approved.

Motion to reinstate case on docket.

Mr. W. W. Clark, for plaintiffs.
Messrs. T. C. Fuller and *George H. Snow*, for defendants.

CLARK, J.: When this case was reached on the regular call of the docket, it appeared that the printed copies of the record, required by Rule 28 of the Rules of this Court, had not been filed. Thereupon, the appeal was dismissed.

The appellant, on five days' notice of his motion, required by Rule 29, seeks now to have the appeal reinstated on the docket. As stated by the Court in *Horton* v. *Green*, 104 N. C., 400, the rule requiring printed copies of certain parts of the record is a very reasonable one, and has been rendered necessary for the more careful and prompt consideration of causes by the steadily increasing volume of business brought to this Court. The rule will be strictly adhered to. Though an appeal dismissed for failure to print the record in the cases, and to the extent designated, will, in a proper case, be reinstated, on motion, after giving the required notice, this will only be done upon *good cause shown.*

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*Head-note by CLARK, J.

In the present case, the appellant filed an affidavit, setting out that the record was printed as required, and that the requisite number of copies was not filed in time, by reason of conversations with the opposite counsel below, which led him to understand that the appeal would be passed over when reached and not called for argument at this term. This is not denied, and makes out a case which entitles the appellant to have his appeal reinstated, and it is so ordered.

Motion allowed.

H. C. WHITEHURST v. ISRAEL PETTIPHER.

Appeal—Weight of Evidence—Assignment of Error.

1. The refusal of the Court below to set aside a verdict on the ground that it was against the weight of the evidence cannot be reviewed on appeal.
2. The Court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction, or because complaint does not state a cause of action, or to the sufficiency of an indictment. Rule 27 and *Code*, § 550; *McKinnon* v. *Morrison*, 104 N. C., 354; *Taylor* v. *Plummer* and *Walker* v. *Scott*, at this term, cited and approved.

CIVIL ACTION, tried before *Brown, J.*, and a jury, at Fall Term, 1889, of PAMLICO Superior Court.

Mr. W. W. Clark, for plaintiff.
Mr. George H. Snow, for defendant.

CLARK, J.: The "case agreed" states: "The plaintiff made no exception whatever during the trial, nor to the charge. The jury found the issues in favor of the defendant. After the verdict the plaintiff moved for a new trial, on the ground that the verdict was against the weight of the evidence, and made no other objection whatever."

The motion was overruled, and judgment was entered against plaintiff. It needs no citation of authority that this Court will not review the refusal by the Court below of a motion to set aside a judgment as being against the weight of the evidence. Indeed, the point was not insisted upon in this Court. The appellant relies upon alleged errors in the charge, not assigned in the "case on appeal."

The Code, § 412 (2), requires exceptions on the trial (except to the charge) to be entered *at the time*. *The Code*, § 412 (3), provides that the charge may be deemed excepted to, though no exception is taken on the trial. But exceptions to the charge, and exceptions taken on the trial, are alike waived and deemed abandoned, unless set out by appellant in making out his statement of "case on appeal." *The Code*, § 550, and Rule 27 of the Rules of this Court. These requirements of the statute, and of the rule made in conformity with them, are reasonable and just. It is no hardship to appellant to require him to assign the errors he relies on, when he has ten days in which to consider the case before serving his statement of the "case on appeal." When this is done, the appellee can then present his view of the evidence, and of the charge, bearing upon the exceptions relied on, and if there is any disagreement the Judge will "settle the case."

So much depends upon the context that this is important. If exceptions could be taken for the first time here (other than exceptions for want of jurisdiction, or complaint not stating facts sufficient to constitute a cause of action), it would render necessary always a voluminous and minute statement of the trial, the evidence, and the charge, lest something be not fully and fairly presented. The object should be, however, as the Court has often said, to send up only so much of the trial, the evidence, and the charge, as is necessary to present the exceptions taken and the errors assigned. Besides, the appellee should not be surprised by allegation of errors here of which no complaint was made below, and which he is unprepared to meet for want of notice. The lines upon which the contest is to be fought out should be made known below, so that when the parties appear in this Court neither will be taken at an unfair advantage. These statutes and the reasons for them have been recently considered and the authorities reviewed in *McKinnon* v. *Morrison*, 104 N. C., 354; *Taylor* v. *Plummer*, and *Walker* v. *Scott*, both at this term.

No error.

WALLACE BROS. v. R. M. DOUGLAS.

Premature Appeal.

An appeal from an order sustaining an exception to a referee's report and recommitting the case to the referee to take further evidence is premature, and will be dismissed.

This was a CIVIL ACTION, heard before *Connor*, *J.*, at November Term, 1889, IREDELL Superior Court, on exceptions to referee's report.

The defendant, among other exceptions, excepted to certain evidence admitted by the referee. The Court sustained the exception.

The case on appeal then states: "This testimony being excluded for the foregoing reasons, the plaintiffs insisting that there is other testimony tending to sustain the findings of the referee, it is considered that the said report be recommitted to said referee to the end that he may pass upon said testimony, and if, in his discretion, he deems it in furtherance of justice, permit the plaintiffs to introduce other competent testimony."

From this judgment the plaintiffs appealed.

Mr. C. H. Armfield, for the plaintiff.
Mr. W. M. Robbins, for the defendant.

CLARK, J.—after stating the case: The appeal was premature and improvidently taken, and must be dismissed. The plaintiffs should have had their exception noted in the record, and if, on the coming in of the amended report and a final judgment thereon, they find it necessary to appeal, the exception will then be reviewed. It may be that, as they themselves suggest, other evidence may be found to supply the place of that excluded, or when the final judgment is rendered they may not desire to appeal. The Court will not take "two bites at a cherry." The rule of practice is settled by so many decisions that we only refer to *Jones* v. *Call*, 89 N. C., 188; *Torrence* v. *Davidson*, 90 N. C., 2; *Lutz* v. *Cline*, 89 N. C., 186; *Grant* v. *Reese*, 90 N. C., 3; *Leak* v. *Covington*, 95 N. C., 193. In *Grant* v. *Reese*, the Court say: "Slight attention to the decisions of the Court would prevent miscarriages like the present, and facilitate the administration of justice."

Appeal dismissed.

T. L. EMRY *et ux.* v. THE RALEIGH & GASTON RAILROAD COMPANY.

Costs in Supreme Court—Brief of Counsel on Rehearing.

When a reargument is ordered by the Court (Rule 38), and an additional brief is printed, the cost thereof, not exceeding ten pages, will be allowed to the successful party, under Rule 37.

Motion by plaintiff to retax the bill of costs so as to allow to the successful party the costs of printing his brief on the reargument.

Mr. R. O. Burton, Jr., in support of the motion.

Messrs. Jos. B. Batchelor, John Devereux, Jr., and *W. H. Day, contra.*

CLARK, J.: In this case the Court, *ex mero motu*, ordered a reargument under Rule 38. Counsel were justified in thinking that an additional argument was desired, and not merely a repetition of the one already had. What was true of the oral argument applied equally to the printed argument, or brief. Had the same brief, or, in substance, a reprint of the former brief, been filed, the costs thereof ought not to be taxed. But in response to the order of the Court, parties have been at the expense of printing, and have filed new briefs containing additional argument and authorities. We think that the successful party should be allowed the costs thereof, not exceeding ten pages, at the rate of sixty cents per page, as authorized by Rule 37. On a rehearing, costs for the brief are allowed, of course. The same rule applies to a reargument, whether the reargument is ordered as to a rehearing, or in any other instance.

A printed brief is always desirable, and is intended to assist the Court. So true is this that in many States the rules require a printed brief to be filed in every case. In no case is a printed brief more necessary than in one which is so important, or so complicated, as to require an order for reargument.

Motion allowed.

T. L. EMRY *et ux.* v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Petition to Rehear—Duties of Counsel.

1. The decision in *Emry* v. *Railroad*, 104 N. C., reaffirmed.
2. The Court reiterates that it will rehear a case only for weighty considerations, and when the alleged error clearly appears.
3. Observations by MERRIMON, C. J., upon the duties and responsibilities of counsel.

This was a Petition to Rehear filed by the defendant. (See 104 N. C.)

Mr. R. O. Burton, Jr., for plaintiff.

Messrs. J. B. Batchelor, John Devereux, Jr., and *W. H. Day*, for defendant.

MERRIMON, C. J.: It is but a reiteration of what has been said in a multitude of decided cases of this Court, to say that it will *rehear* a case only for very weighty considerations, and when the alleged error clearly appears.

This is not a mere empty declaration; it is serious, and founded in that essential fundamental element of Courts of last resort that makes it their duty and prompts them to adhere to and preserve the uniformity and stability of their decisions. Such Courts are of the greatest consequence. They do not simply decide particular cases before them, but as well expound and determine what the law is as applicable to them, and to cases of like nature, indefinitely in the future, whenever or however they may arise. If such decisions are uncertain, conflicting and indeterminate, the necessary consequence must be confusion in the application of the law, so that the people, and also those who administer the government in all its branches cannot, to a greater or less extent, know what the law is and what their rights and duties are. The law and right become unsettled and confused, and public disorder and disastrous consequences follow.

It is the high duty of such Courts to exercise patience, diligence, care and scrutiny in the examination of cases, and to decide them correctly; but in addition, a chief duty of great moment to the public is to make their decisions as to what the law is and in its application uniform and stable. They have no authority to make or unmake the law. Their solemn duty is to determine what it is, and to apply it as they find it to be. Hence, departures from decided cases and the introduction of new and cherished opinions and doctrines are not to be encouraged.

Every intelligent lawyer must be sensible of the truth and importance of what has just been said. And yet, applications to rehear cases are constantly made, without due regard to the serious character of such an application, and with slight observance of the stringent rules and regulations prescribed for the purpose of preventing hasty and inconsiderate applications. Learned counsel oftentimes seem to forget their duty to the Court, in the administration of justice, and the gravity of rehearing a case. They seem to think only, or mainly, of the parties directly interested, and inadvertently fail to look beyond them to the public interest, and the whole duty of the Court as a tribunal of last resort, whose dignity, character, thoroughness and correctness in its decisions they ought to remember and care for. Lawyers have much to do with the administration of public justice. They are officers of the Court in an important sense. By reason of their right to practice law, granted by the State, they are interested in, and it is their duty to uphold, the dignity and honor of the Courts as tribunals, and to see, as sentinels, that the laws are justly administered. In such respects they owe the public a duty. They are not, as some seem to think, a class of skilled gamesters, whose chief aim and purpose is to cheat and warp and thwart and defeat the ends of justice. Such things every well-bred lawyer scorns and detests.

While counsel should, under the rule applicable, unhesitatingly certify that, in his opinion, there is error in the decision of the Court complained of if he has such opinion, he should not have it until he has scrutinized the case in which it was made, just as he would have done if he had been the Judge, and it had been his duty to decide the case. He should not form his opinion in a hurry, as is sometimes the case, to gratify a brother lawyer who feels unhappy because he lost his case. That should go for naught. This is so, because, as we have said, to rehear a case is extraordinary and of serious moment, affecting not only the parties directly interested, but the administration of the law and the public.

By what has been said is not meant that no case shall be reheard. There are cases that ought to be reheard. Courts sometimes, be they ever so vigilant and pains-taking, make mistakes. In proper cases, they will gladly hasten to correct errors. We have had occasion at the present term, in *Gay* v. *Grant*, to cite numerous cases that point out with clearness what will and what will not entitle a complaining party to have his case reheard. These cases are authoritative. It is our plain duty to observe and adhere to them, and we do not hesitate to do so.

This is an application to rehear the case of *Emry* v. *Railroad*, 102 N. C., 209, decided at the February Term, 1889. We have heard it repeatedly argued and given it much consideration, and are of opinion that the petition must be dismissed. The case we are asked to rehear was elaborately and ably argued on both sides. The Court had the fullest opportunity to understand it in all its bearings, and gave it earnest and protracted consideration. No material point was overlooked, nor has any direct authority been called to the attention of the Court that was not considered—the case has only been reargued! Although there was some diversity of opinion among the members of the Court as to one or two of the material questions decided, in our judgment, no adequate reason has been submitted or cause assigned that ought to induce the Court to grant the prayer of the petitioner. *Gay* v. *Grant*, *supra*, and the cases there cited.

Our learned brother, who delivered the opinion of the Court in *Emry* v. *Railroad*, said, *obiter:* "The defendant has no reason to complain that the Court allowed the jury to apply, as the test, the abstract principle that the plaintiffs were bound to exercise that degree, and only that degree, of care which a man of ordinary prudence would exhibit in the management of his affairs," &c. The jury, by their finding, corrected any possible error in that respect. With the view to prevent possible misapprehension, we deem it proper to say here that a majority of the Court do not concur in that expression of view, and do not think it consistent with decisions of the Court on that subject.

Petition dismissed.

*S. C. ROBESON et al. v. JAMES P. HODGES, et al.

Amendment—Jurisdiction—Exception on Appeal.

1. Where a complaint in an action begun before the Clerk, as Probate Court, states matters properly triable in that Court, an amendment cannot be allowed in the Superior Court engrafting matters of which the latter Court alone has jurisdiction.
2. When, without amendment in such case, matters are investigated without objection, of which the Superior Court alone had jurisdiction, and judgment is rendered thereon, the implied consent does not confer jurisdiction, and advantage can be taken of the defect in this Court.
3. When there is no exception taken except to the judgment, usually no case on appeal is necessary, and it is sufficient to file the exceptions thereto in ten days after judgment, as provided by Rule 27 of this Court.

APPEAL from a judgment in favor of defendant Hodges, rendered by *Gilmer, J.*, May Term, 1889, CUMBERLAND Superior Court, upon a referee's report.

Messrs. R. H. Battle and *S. F. Mordecai*, for the plaintiff.
Messrs. N. W. Ray and *W. E. Murchison*, for the defendant.

CLARK, J.: This was an action begun by certain wards of the defendant Hodges against him for an account and settlement as guardian. It was begun before the Court of Probate in 1878, and transferred to the Superior Court for trial. The complaint alleges that the appellant W. J. Smith, who afterwards came in and was made party plaintiff, and the other appellant Mary L. Smith, who, not joining in the action, was made a defendant, were two of the wards; that as to the first named, he had been fully settled with, but as to the other appellant, that she had never been settled with.

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* Head-notes by CLARK, J.

The answer alleged that both of the appellants had been duly settled with according to law, and had received their full shares of the estate. There was no allegation of any over-payment to appellants by mistake or inadvertence, or otherwise, and no prayer for judgment against them. On a reference, the account was stated as to them without objection, as well as to the other wards, and it being reported by the referee that each of the appellants had been over-paid by defendant Hodges, the Court rendered judgment against them and in favor of defendant Hodges, for repayment to him of such over-payment.

It is true that there must be *allegata* as well as *probata*, but that usually applies when objection is made to the proof offered. Then the Court, if the objection is well taken, must either rule out the evidence or allow amendment to the *allegata*. After judgment it is too late to object that there is no complaint. *Leach* v. *Railroad*, 65 N. C., 486; *Mebane* v. *Pope*, 81 N. C., 22; *Little* v. *McCarter*, 89 N. C., 233. The Court has power to allow amendment after verdict, so as to supply the omission of an averment in the pleadings. *The Code*, §§ 273 and 274; *Pearce* v. *Mason*, 78 N. C., 37; *Penny* v. *Smith*, Phil., 35; *Dobson* v. *Chambers*, 78 N. C., 334.

The appellee did not ask the Court below for the amendment, either before or after judgment, but asks this Court to allow it to be made now, in furtherance of justice. This Court has the power to make amendments or to remand the case that they may be made in the Court below (*The Code*, § 965), but only to the same extent and in such cases as the Superior Court could allow amendment. It is very clear that the Court below could not have allowed the amendment asked here, which is to support the judgment, by allowing the defendant and appellee, Hodges, to amend his answer by setting up the equitable claim of mutual mistake in making the over-payments to the appellants, or a counterclaim for money had and received. Such allegations, if made, are only cognizable in the Superior Court (*Murphy* v. *Harrison*, 65 N. C., 246), and, as this action was begun in the Probate Court (now Clerk), the amendment could not be made.

In *Capps* v. *Capps*, 85 N. C., 408, it is held that when a case which is properly cognizable in the Superior Court, but erroneously brought before the Clerk, gets into the Superior Court by appeal or otherwise, the latter Court will amend the summons and treat the action as if originally brought in the Superior Court, and proceed; but when the action is properly triable in the Probate Court, it is error in the Superior Court, on appeal, to allow the complaint to be amended by engrafting new matter, cognizable only in the Superior Court at term. To same effect is *Finch* v. *Baskerville*, 85 N. C., 205. Chapter 276, Acts 1887, in no wise affects this principle, as it only provides that when cases are sent up to the Superior Court from the Clerk for the determination of issues of fact or law, that Court, after determining said issues, instead of remanding the case, may retain it and "hear and determine the matters in controversy in said case." In the analagous case of an amendment in a case brought by appeal from a Justice of the Peace, the Court say, in *Boyett* v. *Vaughan*, 85 N. C., 363: "It is the jurisdiction of the Justice of the Peace, which, on appeal, gives jurisdiction to the Superior Court, and, of course, if the Justice had no jurisdiction the Superior Court could have none, and, therefore, by allowing an amendment in the transcript, which enlarges the cause of action beyond the jurisdiction of the Justice, it must necessarily oust itself of jurisdiction." These words are quoted and approved in *Ijames* v. *McClamroch*, 92 N. C., 362.

The judgments appealed from are such as could not have been given, if allegations had been properly made, either originally or by amendment, in a case begun like this, before the Probate Court.

The appellee insists, however, that there is no case on appeal. Exceptions to the judgment were filed in ten days after judgment rendered, under Rule 27 of this Court. A case on appeal is necessary to set forth exceptions to evidence and to the charge, but this exception is for want of jurisdiction. This is an error apparent on the face of the record proper, and the Court will take notice of it, though not assigned. *The Code*, § 957; *Thornton* v. *Brady*, 100 N. C., 38.

Error.

*THOMAS A. McNEILL et al. v. JAMES P. HODGES et al.

Referee's Report—Exceptions—Jurisdiction of Clerk—Judgment against Co-defendants—Prayer for Relief.

1. Exceptions to a referee's report may be filed as a matter of right at the term to which the report is made. The filing of exceptions after that term is in the discretion of the Judge, and from the exercise of such discretion no appeal lies.
2. The Clerk has jurisdiction of a proceeding by a ward against his guardian for an account.
3. A judgment can be rendered in favor of one co-defendant against another.
4. A party can recover judgment for any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not.

APPEAL from the ruling of *Gilmer, J.*, at May Term, 1889, of CUMBERLAND Superior Court.

The following is the statement of the case on appeal:

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* Head-note by CLARK, J.

"This was a special proceeding, begun before the Clerk of the Superior Court of Cumberland County more than ten years since, calling the defendant Hodges, guardian, to an account and settlement with his wards, the plaintiffs above named. The guardian accounts of the defendant have been stated four times, and opportunity given each time for the parties to except to the same. The cause coming on to be heard before *Gilmer*, *J.*, at May Term, 1889, the plaintiffs moved to strike from the file certain exceptions, which appear to have been filed on April 23d, 1889, during the interval between terms, and to confirm the report of referee. It appeared that the report of the referee had been made to January Term, 1889, and the defendant's counsel notified that the same had been filed before the beginning of January Term.

"His Honor, after hearing arguments on both sides, and after inspection of the exceptions of April 23d, and examination of the record, in the exercise of his discretion, allowed the motion of plaintiffs, and the defendant excepted. The defendant then moved for leave to file the exceptions of April 23d as of May Term, 1889, which motion his Honor, in the exercise of his discretion, refused, and the defendant excepted.

"There was a judgment rendered confirming the report in favor of the several plaintiffs for the several amounts due them. Appeal by defendant."

Messrs. R. H. Battle and *S. F. Mordecai*, for plaintiffs.

Messrs. N. W. Ray (by brief) and *W. E. Murchison*, for defendant.

CLARK, J.: "It is a well-settled rule," say the Court in *State* v. *Peebles*, 67 N. C., 97, "that exceptions to such reports must be made as a matter of right at the Court to which the report is made." After that term, if judgment be not entered thereat, it is a matter of discretion with the Court to allow exceptions to be filed, and from the exercise of such discretion no appeal lies. This ruling is recognized and sustained in *University* v. *Lassiter*, 83 N. C., 38; *Commissioners* v. *Magnin*, 85 N. C., 114; *Long* v. *Logan*, 86 N. C., 535.

The January Term of Cumberland Superior Court, to which the referee's report was returned, was a regular term to which process was returnable, and differed from other terms only in that civil causes requiring a jury could not be tried thereat, except by consent of parties. Acts 1887, ch. 37. The report was properly filed at said term. It seems, from the statement of the case, that the defendant's counsel knew that the report had been filed before the January Term began. They should have filed their exceptions at that term. The case had been a long time pending. It was begun in 1878, and was in this Court as far back as 83 N. C., 504 (1880). The attempted filing of exceptions in April was without authority of law, and it rested in the discretion of the Judge whether he should strike them out, as did also his refusal of the application to file exceptions at the May term.

The defendant moves, at this late day, to dismiss the proceedings in this Court, because the Probate Court, in which it originated, did not have jurisdiction. The action is brought by wards against their guardian for an account, and the statute then in force (C. C. P., 481), placed the jurisdiction in the Probate Court. *Rowland* v. *Thompson*, 65 N. C., 110. It is now transferred to the Clerk. *The Code*, §§ 102 and 1619.

The defendant also moves to reverse the judgment rendered in favor of his co-defendant, J. L. Smith, on the ground that there is nothing in the pleadings to support such judgment, and no prayer for relief in favor of J. L. Smith. The complaint specifies J. L. Smith as one of the wards entitled to an account, states why J. L. Smith is made party defendant, and asks that the account of the said guardian be stated as to each of the wards. There is no separate prayer for judgment by J. L. Smith, but no exception was made as to his being a party, and no denial of his being entitled to an account, and no objection was entered to stating the account as to him. He was a proper party. *Southal* v. *Shields*, 81 N. C., 28. The complaint alleges that J. L. Smith has not been settled with. This is not denied in the answer. Throughout the proceeding he is treated as having adopted the allegations of the complaint and its prayer for relief. Indeed, he was only in form a defendant, but in fact the statute authorizes such judgment by one co-defendant against another. *The Code*, § 424 (1); *Hare* v. *Jernigan*, 76 N. C., 471; *Clark* v. *Williams*, 70 N. C. 679; *Hughes* v. *Boone*, 81 N. C., 204. A cause of action having been stated as to J. L. Smith, he can have any relief to which the facts alleged and proven entitled him, though not demanded by a prayer for relief. *Dunn* v. *Barnes*, 73 N. C., 273; *Knight* v. *Houghtalling*, 85 N. C., 17; *Jones* v. *Mial*, 82 N. C., 252. It is too late, after judgment, especially since defendant acquiesced in treating the complaint as if it had been adopted by Smith, to object that there was no complaint filed by him. *Robinson* v. *Hodges*, at this term, and cases there cited.

Affirmed.

*C. J. TAYLOR v. J. C. PLUMMER.

Appeal—Exceptions—Rule 27.

1. Where there are no exceptions stated in the case on appeal, and no errors appear upon the face of the record, the judgment must be affirmed.
2. The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to (*The Code,* §412 (3)), but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal (*The Code,* §550), and if this is not done, the exception is deemed waived. (Rule 27 (4).)

This was a CIVIL ACTION, tried before *Gilmer, J.*, at Fall Term, 1889, of Alleghany Superior Court.

Defendant appealed.

Mr. J. N. Holding, for plaintiff

Mr. C. M. Busbee, for defendant.

CLARK, J.: No exceptions to the evidence or rulings and no assignments of error are set out in the case on appeal. There is nothing to show that the defendant is dissatisfied with anything that occurred during the progress of the trial beyond the bare fact that he appealed; nor does any error appear upon the face of the record proper, as distinguished from the "case on appeal." By the settled rules of practice, the judgment must be affirmed.

It appears that the defendant asked the Court to give certain special instructions, which were not given—at least in the form asked. It does not appear that they were asked in apt time—*i. e.*, at the close of the evidence (*Powell* v. *Railroad,* 68 N. C., 395), nor that they were in writing, as required by *The Code*, § 415. Assuming, however, that it did appear that the instructions were asked in writing and in apt time, no exception was noted to the failure to give them, and no assignment of error on that ground is stated in the case. *The Code*, § 550, requires the appellant to "cause to be prepared a concise statement of the case, embodying the instructions of the Judge as signed by him, if *there be an exception thereto*, and the requests of counsel of the parties for instructions, if there be *any exceptions on account of the granting or withholding thereof*, and stating separately, in articles numbered, *the errors alleged*." When the assignment of error or exception for failure to give an instruction asked is set out in the appellant's case, as required by this section, the Judge is put upon notice to give, fully, the charge on that point, and it may appear, if this is done, that there was no error, or that the instruction, though refused as asked, was given in substance. This being a Court for the correction of errors, the errors complained of must appear by exception noted, or error assigned, and be set out in the case on appeal. The provisions in this regard in the statute are easily observed and have been often construed. The rules of the Court, and the decisions, are explicit. The statutory regulations as to exceptions and assignment of error are intended to give equal rights to both sides, and to prevent surprise by springing unexpected objections and presenting points in this Court which would have been cured by a more careful and accurate statement of the case on appeal, in that particular, if the matter had been called to the attention of the other party by the appellant's statement of the case on appeal. This, too, avoids cumbering the transcript with needless fullness in immaterial matters as to which no exception is made.

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* Head-note by CLARK, J.

In substance, these provisions are:

1. Exceptions to the evidence and all matters occurring on the trial, except the charge of the Court, must be noted

at the time. *The Code*, § 412 (2). If not, they are waived. *State* v. *Ballard*, 79 N. C., 627; *Scott* v. *Green*, 89 N. C., 278.

2. The charge and the refusal to give instructions asked, need not be excepted to *at the time*, but are deemed excepted to. *The Code*, § 412 (3). But none the less, it is the duty of the appellant to assign specifically the errors in that regard, in making out his statement of the case on appeal. *The Code*, §550; *McKinnon* v. *Morrison*, 104 N. C., 354, in which case the authorities are collected and reviewed.

3. An omission to charge on any point is not usually assignable as error, unless an instruction was asked and refused. *State* v. *Bailey*, 100 N. C.; 528, and cases there cited.

4. Exceptions noted on the trial, and exceptions which, after the verdict, the losing party desired to assign to the charge, or to the refusal or granting of special instructions, must be set out by appellant in making out his statement of the case on appeal (*The Code*, § 550, cited above), or they are deemed waived. No other exceptions than those set out "will be considered by the Court, except exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest of judgment for the insufficiency of an indictment." Rule 27 of the Rules of Court.

5. Errors upon the face of the record proper, *i. e.*, process, pleadings, judgment, &c. (as distinguished from errors committed in the process of the trial), will be corrected without assignment of error. *The Code*, § 957; *Thornton* v. *Brady*, 100 N. C., 38. These will be found, however, to fall almost necessarily into one of the exceptions stated in Rule 27, *supra*, *i. e.*, defect of jurisdiction, defective cause of action or insufficiency of an indictment.

There are no errors assigned for our consideration in the case on appeal, and none are apparent from the face of the record. We may note, however, that the features of this case seem to place it within the principles laid down in *Moore* v. *Parker*, 91 N. C., 275.

There was no evidence of contributory negligence sufficient to go to the jury, and the charge sent up is correct.

Affirmed.

*In re I. M. DEATON et al.

Contempt—Appeal—Finding of Fact—Alternative Judgment—Jurisdiction.

1. Alternative judgments are not allowed either in civil or criminal cases, hence it is error to sentence a party to "pay a fine of $40, and in default thereof be imprisoned thirty days."
2. By inherent right, as well as by statute, every Court has the power to punish contempts committed in its presence, or so near as to interfere with the transaction of its business, and in such cases no appeal lies to any other Court.
3. Where the contempt is not committed in the presence of the Court, but, as here, by the wilful disobedience of the process of the Court, and the publication of grossly inaccurate accounts of its proceedings in a newspaper with intent to bring the Court into contempt, an appeal lies.
4. On such appeal, if from the Superior Court to this Court, the findings of facts by the Judge are conclusive, and this Court can only review the law applicable to such state of facts. Otherwise, on appeal from a Court below the Superior Court, to that Court, it is then the duty of the Superior Court Judge to review the facts and the law, and, in his discretion, he can hear additional testimony, orally or by affidavits.
5. It is the duty of the Court passing sentence in proceedings for contempt to set out in the record the facts found, upon which judgment is passed. If the contempt consists in publishing "grossly inaccurate accounts of the proceedings of the Court," the findings must show that the publication was made with intent to bring the Court into contempt, and the language used must be found and set out.

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* Head-notes by CLARK, J.

6. *The Code*, §654, providing proceedings "as for contempt," applies only to civil actions—except sub-sections 4, 5 and 6. It is only in proceedings as for contempt that the notice to show cause must necessarily be based upon an affidavit.
7. A party charged with contempt, is not entitled to a trial by jury.
8. The Mayor has jurisdiction to punish for contempt.

This was a Proceeding for Contempt, instituted before the Mayor of the town of Troy, in Montgomery county, and came to the Superior Court by appeal from the Mayor's Court, and was heard at Spring Term, 1889, of MONTGOMERY Superior Court, before *Brown, J.*

The defendants offered affidavits in the Superior Court tending to show that they were not permitted to file any answer in the Mayor's Court, also affidavits tending to show that the publication which was made by them was not grossly inaccurate, but was true in the main; and also affidavits tending to show that the defendants did not disobey the notice of said Court, but were present before the time set, and at the time set, and the cause was continued upon the affidavits and facts.

The defendants asked the Court to reverse the facts found by the Mayor, or to grant the defendants a trial by jury. The defendants contended that they ought to have the right to have the facts reviewed by the Court.

The judgment of the Mayor, appealed from, is as follows: "This cause coming on to be heard, and after hearing the defendant's statement in regard thereto, it is adjudged by the Court that the said I. M. Deaton and T. M. Hall wilfully and designedly published said grossly inaccurate statement in the *Troy Times* for the purpose of bringing this Court into contempt and ridicule, and that they further contemptuously refuse to obey the order of this Court in refusing to appear before said Court.

"It is therefore adjudged that the said I. M. Deaton and T. M. Hall are guilty of a contempt of this Court, and it is ordered and adjudged that said I. M. Deaton and T. M. Hall pay each a fine of forty dollars and the costs of this proceeding, and, in default thereof, that they be committed to the common jail for the county of Montgomery for thirty days, and until they be discharged according to law."

The notice to show cause appears not to have been based upon affidavit, but to have been issued by the Mayor, *ex mero motu.*

The appeal coming on to be heard in the Superior Court, his Honor, being of opinion that he could not review the facts found by the Mayor, confirmed the judgment, and gave judgment against the defendants.

The defendants excepted and appealed.

Messrs. J. M. Brown (by brief), *J. B. Batchelor, John Devereux, Jr.*, and *J. C. L. Harris,* for respondents.

No counsel, *contra.*

CLARK, J.: Alternative judgments are not allowable in either civil or criminal cases. *State* v. *Perkins*, 82 N. C., 681; *Dunn* v. *Barnes*, 73 N. C., 273; *Strickland* v. *Cox*, 102 N. C., 411. The sentence "to pay a fine of $40, and, in default thereof, be imprisoned thirty days," is erroneous. This, however, would not dispose of the case on the merits, but would merely require it to be remanded for a proper sentence. *State* v. *Lawrence*, 81 N. C., 522; *State* v. *Green*, 85 N. C., 600. We will therefore consider the other points raised by the appeal.

The power to punish for a contempt committed in the presence of the Court, or near enough to impede its business, is essential to the existence of every Court. In such cases, "necessarily there can be no inquiry *de novo* in another Court as to the truth of the fact." RUFFIN, C. J., in *State* v. *Woodfin*, 5 Ired., 199. The requirement, Acts of 1846, now *The Code*, § 650, that the Court shall find the facts constituting the contempt and have them spread upon the record, does not have the effect to give the right to an appeal nor to a writ of *certiorari*, in this class of contempts, and for the reasons justly and forcibly given by NASH, C. J., in *State* v. *Mott,* 4 Jones, 449. But such facts, when found and spread upon the record, may authorize a revising tribunal, on a *habeas corpus,* to discharge the party, if it plainly appear that the facts, as found by the committing Court, in law do not justify a sentence for contempt. *Summers, ex parte,* 5 Ired., 149. Another effect of the statute is to "furnish evidence against the magistrate, upon an indictment for malfeasance in office," when there is such. *State* v. *Mott, supra.* So inherent is the right to punish for contempt, that the Legislature would have no power to deprive the Courts of its exercise. Cons., Art. IV., § 12; *In re Oldham,* 89 N. C., 23.

When the contempt is not committed in the presence of the Court, but, as here, by the alleged wilful disobedience of the process of the Court and the publication of grossly inaccurate accounts of its proceedings, with intent to bring the Court into contempt, there is not that necessity for prompt punishment nor the strong reasons which forbid the allowance of an appeal, which exist as to contempts when committed in the presence of the Court. Hence it has always been held that as to contempts not committed in the presence of the Court, an appeal lies. *In re Daves,* 81 N. C., 72; *In re Walker,* 82 N. C., 95; *Cromartie* v. *Commissioners,* 85 N. C., 211; *Robbins, ex-parte,* 63 N. C., 309.

In this class of contempts on appeal from the Superior Court, the findings of the Judge as to the facts are conclusive, and this Court can only review the law applicable to such state of facts. It is otherwise, however, on appeals from a subordinate Court to the Superior Court. In that case, it is the duty of the Judge to review the findings of facts of the Court below, as well as the rulings of law; and when, in furtherance of justice, it may be required, the Judge can hear additional testimony, either orally or by affidavit, in making up his own findings of fact. The reason of this distinction is not only because of the greater dignity of the Superior Court, and the greater trust reposed in the experience and judgment of its presiding officers, but because that Court is for the trial of matters of fact as well as of law. They are held in the same county where the offence was committed, and can readily procure the attendance of witnesses. The trial in the Superior Court is *de novo* on the facts and the law. Even the limitation upon the review of the facts, where the amount involved was less than $25, was repealed by the constitutional amendments of 1875. In this Court, errors of law, and not of fact, are reviewable. Though witnesses in some instances may be summoned (*The Code*, § 963), it has not been the practice. Owing both to the expense of bringing witnesses here from a distance, and the great addition it would make to the already large and steadily increasing volume of business in this Court, to examine affidavits on questions of fact, the Court has adhered to its settled ruling, that it will not pass upon the facts, except as to injunctions and in similar cases, but will take the findings of fact by the Judge who tried the cause below as conclusive. None of these reasons apply to an appeal from an inferior tribunal to the Superior Court. An analagous case is the finding that the prosecution is frivolous or malicious. This finding may be reviewed by the Superior Court on appeal from a lower Court (*State* v. *Murdock*, 85 N. C., 598; *State* v. *Powell*, 86 N. C., 640); but such finding, when made by a Superior Court, is final and not reviewable in this Court. *State* v. *Hamilton* (at this term) and cases there cited.

It is the duty of the Court in passing sentence for contempt, when committed in the presence of the Court, though no appeal lies, to spread its findings of fact upon the record. *The Code*, § 650. The reasons therefor are given in *State* v.

Mott, and cases cited above. For a stronger reason, the facts should be set out in this class of contempts, in which the party is entitled to have the matter reviewed by an appeal. The judgment of the Mayor, as set out in the record, is fatally defective as to the allegation of publishing grossly inaccurate accounts of judicial proceedings, in that it does not set out and recite in what the publication consisted. It is true, that in the notice to show cause, a certain article is charged and set out as published by the respondents. But in the judgment there is no specific finding that such article, and in the words charged, was published by the defendants. It can only be inferred. This is not sufficient. The article, as published, must be set out in the judgment, and its publication and the intent with which it was published, must be found as facts by the Court. The provision for proceedings "as for contempt" prescribed in *The Code*, § 654, applies only to civil actions, except subsections 4, 5 and 6. *Cromartie* v. *Commissioners*, 85 N. C., 211. Proceedings "as for contempt" should always be based upon affidavits. We do not think that this is required in proceedings for contempt proper, which, whether the contempt is committed in the presence of the Court or not, are begun by the Court, *ex mero motu*, to preserve its dignity, to maintain order, or to enforce the respect due it, and obedience to its process. *Ex parte Moore*, 63 N. C., 397.

That a defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts is well settled. In *Baker* v. *Cordon*, 86 N. C., 116, SMITH, C. J., says: "The proceeding * * * is necessarily summary and prompt, and, to be effectual, it must be so. The Judge determines the facts and adjudges the contempt, and while he may avail himself of a jury, and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so, or not," citing *State* v. *Yancey*, 1 Car. L. Rep., 133; *State* v. *Woodfin*, 5 Ired., 199; *Moye* v. *Cogdell*, 66 N. C., 403; *Crow* v. *State*, 24 Texas, 12.

It was contended below that a Mayor has no jurisdiction to punish for contempt, because not named among the officers having that power in *The Code*, § 651. Apart from the fact that every Court inherently possesses such power independent of statutory enactment, *The Code*, § 3818, constitutes the Mayor an Inferior Court, and gives him the powers of a Justice of the Peace.

The case must be remanded to the Superior Court, to the end that it may review the findings of fact by the Mayor, as well as his conclusions of law, and if, thereupon, the defendants are adjudged guilty, to pass a definite sentence in accordance with law.

Error.

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*J. A. WHITE v. J. B. CONNELLY et al.

Clerk—Mortgage—Deed and Probate of—Registration

1. When the Clerk of the Superior Court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution, and privy examination of a married woman by a Justice of the Peace, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function, which cannot be delegated to a deputy, nor exercised by the Clerk as to an instrument to which he is a party.
2. Hence, when the Clerk, who is the grantor in a deed of trust, acknowledges the execution of the same before a Justice of the Peace, who also takes the privy examination of grantor's wife, and the Clerk adjudges the certificate made by the Justice of such acknowledgment and privy examination to be in due form, admits the instrument to probate and orders registration: *Held*, that such registration is without legal warrant, and invalid as to third parties.

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* Head-notes by CLARK, J.

This was a CIVIL ACTION, upon a case agreed, tried before *Connor, J.*, at November Term, 1889, of IREDELL Superior Court.

The case is stated in the opinion.

Messrs. W. M. Robbins, B. F. Long, H. Bingham, L. C. Caldwell and *C. H. Armfield*, for the plaintiffs

Messrs. D. M. Furches and *A. L. Coble*, for the defendant.

CLARK, J.: The defendant J. B. Connelly, who was, at that time, Clerk in the Superior Court of Iredell, executed a deed in trust on the property therein named to defendant Davidson, trustee, to secure certain indebtedness. The deed of trust was duly acknowledged on the 23d day of August, 1888, before P. Tomlinson, Esq., a Justice of the Peace, by said Connelly and his wife, and her private examination certified by him, and on the same day the same was certified to be in due form of law and ordered to be registered by J. B. Connelly, the Clerk of the Superior Court of Iredell County, and was registered in the office of the Register of Deeds of Iredell, on the day aforesaid.

On the 11th of September, 1888, the plaintiff caused a warrant of attachment to be levied upon property covered by aforesaid deed of trust. On the 13th day of September, 1888, aforesaid certificate of P. Tomlinson was certified to be in due form of law by J. H. Hill, Clerk of the Superior Court of Iredell County, and on the same day, to-wit, the 13th day of September, 1888, was registered in the office of the Register of Deeds of Iredell County.

The attachment proceedings and levy are admitted to be valid. The only question raised for our consideration is whether the plaintiff acquired thereby a priority over the trustee in said deed, or whether the admitting to probate and order of registration by defendant Connelly (as Clerk) of the deed in which he was grantor, on August 23d, was valid. As the law formerly stood, the acknowledgment of the grantor, or proof of execution by him, and privy examination of the wife, was had before the officer or Court having power to probate the instrument and order its registration. (Rev. Code, ch. 37, § 2.) When the grantor or subscribing witness resided out of the State, a commission issued to take the acknowledgment of the grantor, or examination of the subscribing witness or privy examination of the *feme covert*. *Ibid*, § 4. If the *feme covert* did not reside in the county, or, if living therein, was too aged or infirm to travel to the Judge or Court, a similar commission issued to take her privy examination. *Ibid*, § 9. Upon the certificate of the commissioner in these cases, the Court adjudged whether the certificate was in due form, admitted the instrument to probate, and ordered its registration.

Owing to inconvenience to parties of travelling to the county town to acknowledge the execution of every instrument requiring registration, and of requiring special commissions to take the examination in lieu thereof, the Acts of 1876–'77, ch. 161, authorized the acknowledgment and privy examination to be taken before a Justice of the Peace. Section 2 of the Act required his certificate to be "adjudged correct and sufficient" by the Clerk. Similar acts have done away with the necessity, in most cases, of appointing special commissioners when the grantor or subscribing witness resides out of the State, by designating the officers who are authorized to take the acknowledgment or proof of execution. *The Code*, § 1246 (3). These acts do not confer upon the Justice of the Peace, nor on the non-resident official, probate powers. They are merely substituted for the special commissioners, formerly required to be appointed on application. Like such commissioners, they make a certificate of the acknowledgment or proof had before them, and thereupon the Clerk, as the Probate Court, if in due form, admits to probate the instrument and orders it to registration. The language (*The Code*, § 1246 (1)) is, that on exhibition of the instrument and such certificate thereon to the Clerk, if in due form, it "shall be admitted by him to probate and ordered to be registered." Admitting to probate is a judicial act. It passes upon more than the certificate being in due form. Its being in due form is a prerequisite. If the certificate is not so found, the instrument is rejected. If the certificate is adjudged in due form, then the Clerk admits to probate, *i. e*, probates it, passes upon the certificate as furnishing proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the Justice or officer certifying is such, and the sufficiency of proof as certified. These are the functions of a Probate Court, and cannot be delegated to a deputy. This case differs from *Holmes* v. *Marshall*, 72 N. C., 37, and *Young* v. *Jackson*, 92 N. C., 144, in that there the Probate Judge of an adjoining county had probate powers, and his adjudication was held sufficient to pass the deed to registration in the county where the land lay, without being passed on by the Clerk in the latter county, the requirement to that effect being merely directory and not essential, the deed having been already "admitted to probate" The statute, however, does not vest any probate powers in the Justice of the Peace, and there is no legislative intent indicated to allow him to probate deeds and order them to registration, which would be the case if the probate of the Clerk was merely directory and could be dispensed with, for "the power to take probate naturally carries with it, as an incident, the power to order registration," says RODMAN, J., in *Holmes* v. *Marshall*, *supra.* This distinction is clearly pointed out by DAVIS, J., in *Evans* v. *Etheridge*, 99 N. C., 43. "Where the evidence is offered to the Court, the entire probate is taken by it, but where the agency of a commissioner is resorted to, a part of this probate, *i. e.*, hearing the evidence, is taken by him and certified to the Court, and thereupon the probate is perfected by an adjudication that the certificate is in due form, and that *the fact of the execution of the deed is established* by the evidence so certified. The Clerk alone can both hear the evidence and adjudicate. This is mandatory. A registration without this adjudication by a Clerk does not create such an equity in the mortgagee, trustee, as affects creditors or subsequent purchasers for value."

The Justice of the Peace, like the commissioner of deeds in that case, merely serves the purpose of the special commissioner to take and certify the acknowledgement and proof under the former law.

This case differs also from *Jackson* v. *Buchanan*, 89 N. C., 74, and *Evans* v. *Etheridge*, 96 N. C., 42, which hold that issuing a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can, therefore, be performed by a deputy, or even by the Clerk, in a case to which he is a party. In the latter case, the Court gives as a reason that thereby the officer settles and adjudicates upon no right, but ministerially as Clerk or agent of the Court, and expressly notes that, in probate matters, the Clerk acts, judicially, as Probate Judge, and is prohibited from acting on matters in which he has an interest.

The act of "admitting to probate" being a judicial act, the Clerk was prohibited from acting on the deed of trust in which he was grantor. *The Code*, § 104 (4), provides that no Clerk can act as to any proceeding "if he or his wife is a party or a subscribing witness to any deed or conveyance." This is not contradicted by the unrestricted powers of probate conferred on the Clerk by section 1246, as that section is to be construed in connection with section 104, and, even if the latter was not enacted, the grant of powers would be subject to the exception that no one can be judge in his own case. *Barlow* v. *Norfleet*, 72 N. C., 535; *Barnes* v. *Lewis*, 73 N. C., 138; *Gregory* v. *Ellis*, 82 N. C., 225; Broom's Legal

Maxims, 118; *Day* v. *Savage,* Hobart's Reports, 212; 2 Strange, 1173.

The common law forbade a man being the judge of his own cause, as "if an act of Parliament give a man power to try all causes that arise within his manor of dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel." 1 Blackstone, 91.

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible, and so manifestly just is this rule, that Lord COKE has laid it down, that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia* and they are *leges legum.*'

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise.

"It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. Accordingly, where the Lord Chancellor, who was a share-holder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord CAMPBELL observing, 'It is of the last importance, that the maxim that 'no man is to be a judge in his own cause,' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest took part in the decision. And it will have a most salutary effect on those tribunals, when it is known that this high Court of last resort in a case in which the Lord Chancellor of England had an interest, considered that his decree, on this account, a decree not according to law, and should be set aside.'

"This will be a lesson to all inferior tribunals, to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence" *Dimers* v. *Grand Junction Canal*, 3 House of Lords Cases, 759; Cooley's Cons. Lim., 410–11; Coke Lit., § 212.

The Code, § 105, allows a waiver of the disqualification, if made in writing. It is agreed, as a fact, that there was not such waiver here; besides, it could not avail unless the opposing parties were present when it was made, and capable of objecting. *Barlow* v. *Norfleet*, 72 N. C., 535. The registration being without due probate to warrant it, is ineffectual to pass title against creditors or subsequent purchasers for value. *Todd* v. *Outlaw*, 79 N. C., 235; *DeCourcy* v. *Barr*, Busb. Eq., 181; *Duke* v. *Markham*, at this term. It is contended, however, that the probate not being conclusive, its total invalidity ought not to prejudice a party claiming under it. It is true the probate can be attacked collaterally, still a valid probate is essential as a prerequisite to a registration. "It is an *ex parte* ascertainment by authority of law, that the instrument registered is authentic, and to be so treated by all persons affected by it, until in some proper way the contrary is made to appear." *Young* v. *Jackson*, 92 N. C, 144.

It is further contended that chapter 252, Acts 1889, amending *The Code*, § 1260, and validating the probate of instruments in cases where Clerks and others have mistaken their powers, cures the defect here. The power of the Legislature to pass such curative statutes in general is unquestionable. *Tatom* v. *White*, 95 N. C., 453. The statute in question has been considered at this term in *Freeman* v. *Person*, and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party.

Our conclusion, therefore, is that the attempted act of admitting to probate, upon the certificate of a Justice of the Peace, by the defendant Connelly, as Clerk of the Court, of a deed in trust, wherein he was grantor, was invalid and ineffectual to pass title as against creditors and purchasers for value, and the attachment in favor of plaintiff having been levied on the property embraced in the deed prior to the re-registration thereof upon a probate by another Clerk, the plaintiff has acquired a lien which has priority over the trustee.

Error.

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*LAURA TURNER v. J. B. CONNELLY et al.

Mortgage—Clerk—Deed, Probate of—Registration.

When a mortgage is acknowledged, and wife's privy examination taken before a Justice of the Peace, but the adjudication that the same is in due form and the order of registration is made by a Clerk of the Superior Court, who is the mortgagee therein, the adjudication and order by the Clerk, and the registration thereunder, are void.

CIVIL ACTION, tried before *Shipp, J.*, at February Term, 1890, of IREDELL Superior Court.

Messrs. C. H. Armfield and *W. D. Turner*, for plaintiff.
Messrs. H. Bingham and *L. C. Caldwell*, for defendants.

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* Head-note by CLARK, J.

CLARK, J: On the 5th of October, 1886, O. M. Connelly and wife executed to defendant J. B. Connelly a mortgage on real estate, which was acknowledged by the mortgagors before a Justice of the Peace of Iredell County, and the privy examination taken by the Justice in the regular form, and thereupon it was admitted to probate and ordered to be registered, by the Clerk of the Superior Court, who was the mortgagee in said mortgage. It was registered October 9th, 1886, and was assigned to the plaintiff by the mortgagee, as collateral security for an indebtedness of his own. In January, 1888, the defendant, to secure an indebtedness to the defendant Sherrill, assigned as collateral a mortgage to himself from O. M. Connelly and wife, on the same house and lot of the said O. M. Connelly aforesaid. This mortgage was also acknowledged before a Justice of the Peace of Iredell County, in regular form, and probated by the said J. B. Connelly, mortgagee, and also Clerk, in the same manner as the Laura Turner collateral mortgage aforesaid; but afterwards the said J. B. Connelly, Clerk, was removed from his office, as such, and one J. H. Hill was duly appointed in his place; whereupon, the defendant Sherrill re-probated and re-registered his aforesaid collateral mortgage, before the said J. H. Hill, Clerk, before the said Turner re-probated and re-registered her collateral mortgage aforesaid, before the Clerk, Hill.

The Court below being of the opinion that the adjudication and order of registration of the mortgages by the Clerk of the Court, J. B. Connelly, who was mortgagee therein, and the registration had thereby, was void, held that the junior mortgage, registered under the adjudication and order of J. H. Hill, the new Clerk of the Court, had priority over plaintiff's mortgage. Plaintiff excepted and appealed.

The facts in this case present no substantial difference to those in the case of *White* v. *Connelly*, decided at this term. For the reasons therein given, there is no error.

Affirmed.

*PIEDMONT MANUFACTURING CO. v. W. T. BUXTON et al.

Appeal—Sheriff's Return—Amercement—Nonsuit.

1. Amercement, and not a civil action, is the remedy given against a Sheriff for not making "due and proper" return of process.
2. When no counter-claim is pleaded, a plaintiff has the right to take a nonsuit at any time before verdict or final judgment. An interlocutory judgment does not deprive a plaintiff of the right to take a nonsuit.
3. When, in an action against a Sheriff for a false return, the Court permits such return to be amended, the plaintiff should note his exception, and, unless the amended return is admitted to be true, proceed to try the issue. An appeal before final judgment on such admission, or a verdict, is premature and will be dismissed.

APPEAL from order of *MacRae, J.*, made at January Term, 1889, of NORTHAMPTON Superior Court, permitting a Sheriff to amend his return on an execution in an action against him for penalties on the said return, for being false and not "due and proper."

Mr. R. B. Peebles, for plaintiff.
Mr. W. J. Peele, for defendants.

CLARK, J.: This is an action brought against the Sheriff upon his official bond for a return upon an execution in favor of relator against one J. D. Boone, as follows: "No property to be found in my county, claimed by defendant, subject to execution." The complaint alleges, as a first cause of action, that this was not "a due and proper return," and a second cause of action, that the "return was false in fact," and judgment is demanded for penalty of $100 on first cause of action, and $500 on second cause of action, both "as imposed by *The Code*, § 2079." The defendant Sheriff, in his answer, asked leave to amend his return, and also filed an affidavit and moved thereon for leave to amend, by striking out the words "claimed by," in said return, and writing "belonging to" instead. The Court granted the motion, and plaintiff appealed. The next day the plaintiff moved to be allowed to enter a *nol. pros.* as to the second cause of action (for $500 penalty), and for judgment for the $100 penalty upon the admissions in the answer, and from the refusal thereof by the Court, again appealed. In this Court, the defendant moved to dismiss the action because the complaint did not state a cause of action, and because the remedy as to the $100 penalty was by motion to amerce and not by civil action.

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* Head-notes by CLARK, J.

The plaintiff would be entitled to any relief applicable to the facts alleged and proven, though not such as demanded in the prayer for relief. *Robinson* v. *Hodges*, at this term, and cases cited. Therefore, on the defendant's motion, it is necessary to examine all the statutes giving penalties for "undue" or "false" returns, for if the plaintiff's allegations bring the case within any one of them, there is a cause of action stated, although he may not be entitled to the relief, "under section 2079," as prayed.

The Code, § 446, provides for an amercement *nisi*, on motion, for $100 for failure to make due return. Section 1112 gives to any one who will sue, a civil action for $100 for "neglecting or refusing" to return process, or making a "false return," or assuming to act as Sheriff, &c., without authority. Neither of these sections authorizes this action; 446 authorizes an amercement only, not a civil action; 1112 is found in the chapter on "Crimes and Punishments," and it is held in *Harrell* v. *Warren*, 100 N. C., 259, to apply only when criminal process is delivered to an officer. The plaintiff's remedy must be found, if at all, in the section 2079, relied on by him.

Section 2079 authorizes the following penalties and remedies: 1. An amercement *nisi* for $100, on "motion and proof" by the party aggrieved, for failure to "execute and make due return." 2. A *qui tam* action for penalty of $500 for a "false return," one moiety to the party aggrieved, and the other to any one who will sue for the same. 3. An action for damages by the party aggrieved. 4. An amercement *nisi* for $100 in Justices' Court, on "motion and proof" by the party aggrieved, for "neglect or refusal" to execute process of such Court.

The $100 penalty for failure to make "due" return is obtainable only by amercement, and not by a civil action, as is here sought. The plaintiff has not stated any facts, therefore, to constitute his first cause of action. There is no allegation, or cause of action, set forth for damages. The second cause of action for $500 penalty for "false return," is properly sought to be maintained by civil action. But as to this the plaintiff asked to take a nonsuit, and one of his assignments of error is for the refusal of the Judge below to allow it to be entered. And as to this the Court below erred. It needs no citation of authority, as was said in *Mauney* v. *Long*, 91 N. C., 170, that a plaintiff cannot enter a nonsuit after verdict or final judgment, but it is equally clear that when no counter claim is pleaded the plaintiff can take a nonsuit, as a matter of right, at any time before verdict or final judgment. It is true no entry to that effect could be made while the case was pending on appeal in this Court (*Hinson* v. *Adrian*, 91 N. C., 372), but during the term the taking of the appeal was *in fieri*. *Turrentine* v. *R. R.*, 92 N. C., 642. The nonsuit should have been allowed, for no verdict or final judgment had been entered. There was nothing except a judgment upon a motion in the cause, and for this reason also the appeal was premature, and must be dismissed. *Wallace* v. *Douglas*, at this term, and cases there cited. The plaintiff should have had his exception entered, and proceeded to try the issue of fact as to the falsity of the return as amended. If that were found for him, then the amendment of process would be immaterial, and no appeal necessary. If the issue on the amended return were found against the plaintiff, then his exception to the order allowing the amendment could be brought up for review.

It is not necessary now, that we pass upon the questions, whether the Judge could allow the amendment of the Sheriff's return after action brought to recover penalties for its falsity, nor whether such amendment, if allowed, should be granted on motion in the original cause in which the return was made, or in this action. We may note, however, that it is not very clear how the plaintiff could have been prejudiced, as to the second cause of action, which alone is valid, by the amendment. The amended return, "no property *belonging* to defendant (Boone) to be found in the county," is broader, and puts a greater responsibility for the truthfulness of it on the Sheriff, and it will be quite sure to embrace not all "claimed" by the defendant in the execution, but possibly more. While the original return was certainly not "due and proper" return, and, unless amended, subjected the Sheriff to amercement, it is not so clear that it could be classed as a false return (*Lemit* v. *Mooring*, 8 Ired., 312), but we refrain from deciding the point. These views probably occurred to the plaintiff and induced his attempted abandonment of that cause of action. As the nonsuit has not yet been entered, the plaintiff still has the right to take it below. If he elect, however, to proceed on the second count, he is entitled to amend his complaint to charge the amended return as "false in fact." Should he admit the truth thereof, or it be found against him by the jury, an appeal from the final judgment will then bring up for review the exception taken to the power of the Judge to allow the amendment of the Sheriff's return.

Appeal dismissed.

*ANNE M. RUFFIN et al. v. JAMES OVERBY.

Color of Title—Adverse Possession—Evidence.

1. In proving continuous adverse possession under color of title, nothing must be left to conjecture. The testimony, if believed, must show the continuity of the possession for the full statutory period in plain terms, or by necessary implication.
2. One entering upon land under a deed, or color of title, that definitely describes the metes and bounds of the land conveyed, or purporting to be passed to him, is presumed to prefer claim to all of the land covered by the paper title under which he holds, and no further.
3. Where one enters upon land, as a lessee of a definite portion of the territory, covered by the deed under which his lessor claims the possession of the former, *enures* to the benefit of his landlord to the outside limits of the latter's deed.
4. The fact that the ancestor of the plaintiff sank a shaft for mining purposes, or built a house for laborers who were working in a mine, on the land, would not be sufficient to show title under color, in such ancestor, unless it had appeared, also, that the house had been continuously occupied or the mine regularly worked for seven years.
5. Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a possession that will mature title.
6. Whatever doubt may have been entertained as to the competency of tax-lists, in cases like the present, this Court has decided that proof of listing land for taxation is admissible as an act done in pursuance of law, and under a claim of ownership, though of very slight import as evidence of title; but if the testimony had been admitted the plaintiffs would still have failed to make a *prima facie* case, and the error does not entitle them to a new trial.

This was an Action to Recover Real Property, tried at the August Term of the Superior Court of STOKES County (1889), *Gilmer, J.*, presiding.

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*Head-notes by AVERY, J.

In support of their contention, the plaintiffs introduced two grants from the State to Gotlieb Shober, dated May, 1795, one calling for 1,920 acres, the other calling for 600 acres; a deed from Gotlieb Shober to Timothy Pickering, dated July 10, 1795, for about 2,700 acres; a deed from Charles Banner, Sheriff of Stokes, to A D. Murphy, for about 2 428 acres, dated December 13 1815, in which deed there is recited "that the land was sold as the land of Timothy Pickering for taxes due for the years 1811 and 1812, there being no goods or chattels to be found, after due advertisement, according to law, according to Act of Assembly, which prescribes the mode for selling lands for taxes." This deed was submitted as color of title only, upon objection by defendant.

A deed from A. D. Murphy to Thomas Ruffin, for 2,428 acres, dated June 8, 1822; the last will of Thomas Ruffin, devising said land to Anne M. Ruffin, and last will of Anne M. Ruffin, who died since the action was begun, devising said land to the present plaintiffs.

Plaintiffs then introduced John L. Worth, surveyor, and the plots filed by order of Court. Worth's testimony tended to show that the lands described in the complaint were included in the boundaries set out in the grants and deeds aforesaid.

Plaintiffs introduced testimony showing that one Charles Banner was, at one time, agent for Judge Ruffin, and that one Alexander King succeeded him as agent about 1849.

Plaintiffs then introduced a deed, executed by said Banner as such agent, to Glidewell, dated December, 1830, for fifty acres of the land included in plaintiffs' boundaries, as located by surveyor Worth, which lay along the eastern boundary of the tract.

Athy Sizemore, a witness for plaintiffs, testified that he was now the owner, and cultivating said fifty acres, and had been from 1865, when he bought from his uncle, Sanford Sizemore; remembers seeing Glidewell in possession of the same land;

that he also saw Sanford Sizemore in possession of the land before he bought, but did not state what years, nor for how long a time either Glidewell or Sanford Sizemore were in possession; that he owned another tract of the Ruffin land adjoining that tract, and also another adjoining tract, once the land of one Banner, and that witness destroyed the poplar corner called for in plaintiffs' deed, because it shaded the crops cultivated around it.

Plaintiffs then read deposition of Miss Maria Ruffin, in which she testified:

"I lived in Stokes County with my father, on what was known as the 'Ruffin land"; my father moved there in 1852 or 1853, by permission of Judge Thomas Ruffin; I lived there a portion of three years, and we tended lots around the house, and father collected rents from Isham Bennett and Mr. Holland; Alexander King was Ruffin's agent at that time—controlled the land and ejected Isham Bennett; Hinton Holland, Joe Amburn, Anderson Bennett, and John and William Bennett were our nearest neighbors; King, as agent of Judge Ruffin, collected rents of Joe Amburn at the time we moved to the Bennett place, on the Ruffin land; Joe Rowe and Job Amburn lived on the Ruffin land; Rowe left because he could not pay the price demanded by Judge Ruffin, and Amburn left because of some trouble about the rents."

Dr. Swain King, witness for plaintiffs, testified that he is fifty-five years of age, a son of Alexander King; he knew the Ruffin land from earliest recollections; his father was agent for Judge Ruffin a long time; when witness was about fifteen years of age, Judge Ruffin came to witness' father and went on the Ruffin land; they were engaged in mining upon the Ruffin land; sunk two or three or four shafts, and operated till stopped by water; shafts, some of them, fifty feet deep; not having sufficient machinery, they built a house for the miners, and another one over the shafts;

father paid taxes and did what was necessary; Isham Bennett lived on the Ruffin land; Amburn lived there; Rowe also lived on the Ruffin land; Archibald Ruffin lived on the lands with his family; witness' father lived in a few hundred yards of the Ruffin land, and cultivated a small part of it—an acre or two.

On cross-examination, said his father bought part of the Ruffin land from Banner, as agent for Ruffin; Ruffin denied Banner's agency; his father surrendered it to Ruffin; don't know that the mining was done on the Ruffin land; don't know where Ruffin boundaries were; defendant has lived where he now lives (not on land in controversy, but near line) thirty or forty years; his father lived on the Green place, in controversy; and died there as far back as I can remember; one Sizemore settled the Green place, and, at his death, old Overby went into possession, at whose death defendant and his son took possession, and held it ever since.

William King was next introduced, and testified that he was a brother of Alexander King; some men lived on what was said to be Ruffin land; they left; the working for minerals was about one-quarter of a mile inside of the Ruffin boundaries; he saw Ruffin give brother two fifty-dollar bills and tell him to work the mines, and if they found anything they would "go snacks"; they worked the mines some three months, struck water and quit; they sunk three or more shafts, and built houses for the hands over the mines; brother Alexander collected rents from Isham Bennett and carried them home, and paid taxes for Ruffin a number of years; I was a member of a school committee, and by agreement with Charles Banner, as agent for Ruffin, we took possession of a piece of the Ruffin land and built a school-house on it, and we occupied it for twelve months, while I was a school committeeman, and it was so occupied some years afterwards; it was built by license of Charles Banner, agent; afterwards, a deed was made to the school-house; this was before my brother became Ruffin's agent; part of the land in controversy was then old settlement.

Hinton Holland, witness for plaintiffs, testified: "I am seventy-odd years old; lived first on the mountain, then near where Archie Ruffin lived; lived near the Ruffin land thirty or forty years; lived a quarter of a mile from Archie Ruffin; Maria Ruffin lived with him; Archie Ruffin cultivated a small part of the land; Rowe lived on the land; Archie Ruffin first moved to the Bennett place, on said land, after Rowe left; moved to the house Rowe left; Rowe lived there some two or three years; Archie Ruffin lived there some three years; Amburn lived on the land and owed rents, and in a controversy between him and Ruffin's agent, King, I was one of the commissioners to assess the rents, which we assessed at twenty dollars per year, going back three years. Archie Ruffin died on the land; his family afterwards left. The land occupied by Archie Ruffin, Rowe and Amburn and Bennett was two miles from land in controversy, and near outside line of plot."

Plaintiffs next offered to show by tax-books—not assessor's list—that the lands had been regularly listed for taxation by Murphy and Ruffin for a long series of years.

His Honor, upon objection by the defendant, excluded the testimony, and plaintiffs excepted.

Joe Hill, Deputy Sheriff from 1844 to 1848, testified that he had collected taxes from Alexander King as agent for Ruffin.

It was in evidence that the Ruffin lands were in great part mountainous, and some of it very "rocky," lying mostly in the Sauratown Mountains.

The plaintiffs rested, and the defendant did not introduce testimony.

His Honor was of opinion that the plaintiffs could not recover upon the evidence, and upon this intimation the plaintiffs submitted to a nonsuit, and appealed.

Mr. R. B. Glenn, for plaintiff.
Mr. C. B. Watson, for defendant.

AVERY, J.—after stating the facts: The Judge below thought that, in the aspect of the evidence most favorable to the plaintiffs, they had failed, when they rested, to make a *prima facie* case, and hence if they have indicated any combination of facts, to which the different witnesses testified, that would, if true, entitle them to recover, the judgment of nonsuit must be set aside and a new trial granted.

The plaintiffs offered testimony tending to show that the land in controversy was granted to Gotlieb Shober in 1795, and then offered, as color of title, a deed from Charles Banner, Sheriff, to A. D. Murphy, covering the land in dispute, dated December 13th, 1815, with which they connected themselves by the mesne conveyances introduced. Assuming, therefore, that the title was shown to be out of the State, it was only necessary, before resting their case, that they should introduce testimony tending to show that they and those under whom they claim had acquired title by continuous open adverse possession of the land in controversy during the period elapsing between the execution of the conveyance by the Sheriff (December 13th, 1815) and the commencement of the action. *Mobley* v. *Griffin*, 104 N. C., 112. In proving such continuous possession, nothing must be left to conjecture. The testimony must, if believed, show the continuity of the possession for the full statutory period in plain terms, or by necessary implication. Hinton Holland testified that one Rowe lived at a certain house on the land for two or three years, and when he left Archie Ruffin moved immediately into the same house and occupied it for three years, thus showing possession positively for only five, possibly for six, years. The witness, at a later stage in the delivery of his evidence, says: "Amburn lived on the land (he does not say how long, when or where), and owed rents, and in a controversy between him and Ruffin's agent, King, I was one of the commissioners to assess the rents, which we assessed at twenty dollars per year, going back three years." It does not appear whether Amburn occupied a different house and at the same time when Ruffin or Rowe lived successively at the Bennett house, or whether he occupied the same house before or after their residence, and if the same, whether any interval elapsed between the surrender by the one tenant and the entry of his successor.

But counsel attempted to gather the necessary inferences by comparing the testimony of different witnesses as follows: Dr. Swain King was fifty years old at the time of trial, and was fifteen when Judge Ruffin went upon the land, and therefore he must have gone there in the year 1849. Miss Maria Ruffin, in her deposition, fixes the time of Archie Ruffin's entry in 1852 or 1853, and says that he remained a portion of three years. We are asked to conjecture, then, (there being no positive evidence) that one Isham Bennett (who, as William King testified, paid rent to his brother Alexander, as agent of Judge Ruffin) occupied for at least a year the house into which Rowe moved as soon as Bennett left, and thus add one year preceding Rowe's entry. We find from the deposition of Miss Maria Ruffin, that while her father lived on the land, Hinton Holland, Joe Amburn, and three men named Bennett, were his nearest neighbors. Her father moved to the house formerly occupied by Rowe as stated by Holland. She testified that Isham Bennett had previously been ejected from the land. Her father moved to the Bennett house, but we are left to conjecture whether it was called the "Bennett house" because some other member of that prolific family had once occupied it, or whether Isham had been the tenant, and if Isham Bennett gave his name to the place, whether, on his expulsion, there was a break in the continuity of the possession, which would be fatal to the claim of plaintiff.

Another suggestion was that possibly the necessary seven years might be made out by supposing that Alexander King rented from Ruffin for a year after he surrendered possession in 1849 of that portion of the land sold by Banner to him two years previously and adding to that year of supposititious possession the previous occupancy for two years under a sale made by Banner, whom Judge Ruffin repudiated as his agent in that transaction. If it be conceded that Alexander King was holding the land sold by Banner without authority, not adversely, but in subordination to Ruffin's title, the insuperable difficulty remains that he was claiming during that period only a definite boundary, not as a tenant, but as a grantee. He stood, at best, in the same relation to the ancestor of the plaintiff as those claiming under Glidewell Sizemore, to whom Charles Banner conveyed fifty acres inside of the boundaries of the tax title in the year 1830, his act, as agent, being in this instance authorized or subsequently ratified. It is a settled principle that one entering upon land under a deed or color of title that definitely describes the metes and bounds of the land conveyed, or purporting to be passed to him, is presumed to prefer claim to all of the land covered by the paper-title under which he holds, and no further. Hence, the possession of Sizemore and his successors, like that of King under the deed from Banner, not being in the name of the whole Murphy tract, did not enure to the benefit of Ruffin. *Davis* v. *Higgins*, 91 N. C., 382; *Lenoir* v. *South*, 10 Ired., 237; *McCormick* v. *Munroe*, 3 Jones, 332; *Staton* v. *Mullis*, 92 N. C. 623.

On the other hand, when one enters upon land as a lessee of a definite portion of the territory covered by the deed under which his lessor claims, the possession of the former enures to the benefit of his landlord to the outside limits of the latter's deed. *Scott* v. *Elkins*, 83 N. C., 424; *Lenoir* v. *South*, *supra*. In our case, Rowe and Archie Ruffin, as tenants, represented the ancestor of the plaintiffs, and if continuous possession had been shown by them for seven years it would have matured his title as effectually as if the house had been occupied by him or his servant.

In *Williams* v. *Wallace*, 78 N. C., 354, BYNUM, Justice, delivering the opinion, says: "A possession under color of title must be taken by a man himself, his servants, or tenants, and by him or them continued for seven years together."

The fact that King & Ruffin, as partners, sank a shaft for mining purposes, or built a house for laborers who were working in a mine on the land, would not be sufficient to show title in Ruffin unless it had appeared also that the house had been continuously occupied or the mine regularly worked for seven years. Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a possession that will mature title. *Loftin* v. *Cobb*, 1 Jones, 406; *Bartlett* v. *Simmons*, 4 Jones, 295; *Williams* v. *Wallace*, 78 N. C., 354; *McLean* v. *Smith* (decided at this term)

Whatever doubt may have been formerly entertained as to the competency of the tax-lists in cases like that before us, it is now settled that proof of listing land for taxation is admissible, as an act done in pursuance of law, and under claim of ownership, though of very slight import as evidence of title. *Austin* v. *King*, 97 N. C., 339; *Faulcon* v. *Johnston*, 102 N. C., 269; *Ellis* v. *Harris* (decided at this term).

The Court erred in sustaining the objection to the introduction of the record of property returned for taxation. But if the testimony offered had been admitted, it would still have been the duty of the trial judge to instruct the jury that the plaintiffs were not entitled to recover, in any view of the testimony, and it is not the duty of this Court, because of that error, to set aside the judgment of nonsuit and grant a new trial, when it is apparent that the plaintiffs have not been injured by the error of the Court, because they would have been in no better plight after than before the introduction of the excluded evidence.

The judgment is affirmed.

Affirmed.

*A. P. SHARPE, Administrator, v. J. B. CONNELY et al.

Official Bond—Clerk—Parties—Sureties.

1. When the proceeds of real estate, in proceedings to foreclose a mortgage given by a person since deceased, is paid into the Clerk's office by judicial order, and subsequently it is directed that the surplus of the fund, after payment of mortgage debt, be paid to the administrator of the mortgagor, as assets to pay debts, noncompliance with such judgment is a breach of the bond, and the administrator is the proper party to maintain an action therefor.
2. The sureties on the bond at the time such breach occurs, are not discharged by the Clerk subsequently renewing his bond with other sureties.

This was a CIVIL ACTION, tried before *Connor, J.*, at November Term, 1889, of Iredell Superior Court.

Proceedings had been formerly instituted to foreclose a mortgage executed by A. A. Sharpe, deceased, to which his heirs at law were parties. At August Term, 1885, the Court confirmed the sale, and, there being a surplus after payment of the mortgage debt, the Court directed its payment into the Clerk's office, and that the Clerk deposit it in bank and hold the certificate subject to the further order of the Court. At November Term, 1885, it was ordered that the Clerk pay over the fund to the plaintiff, as administrator of A. A. Sharpe, to be used as assets in payment of the debts of his intestate. The defendant Connelly was the Clerk of the Court, and the other defendants were sureties on his official bond from December, 1882, to December, 1886. It is found by the jury that the amount directed to be paid into the Clerk's office by judgment of August, 1885, was paid into the office, but that the Clerk did not deposit in the bank, as directed, and that it has not been paid to the plaintiff, as ordered by the Court in November, 1885. This action is for breach of the bond in that respect. The only exception is to the refusal of the Judge to give the following instructions asked by defendant:

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* Head-notes by CLARK, J.

1. That when the money was first received by J. B. Connelly, it was the property of the heirs at law of A. A. Sharpe.

2. That to entitle the plaintiff to recover, he must show a conversion of the money after November Term, 1885, of Iredell Superior Court, and before the first Monday in December, 1886.

3. That there is no presumption as to the time of the conversion until after a demand, and there being no demand made in this case of J. B. Connelly, the plaintiff must show a conversion before the 1st of December, 1886, to entitle him to recover.

Verdict for plaintiff. Appeal by defendant.

Mr. W. M. Robbins, for plaintiff.

Messrs. L. C. Caldwell and *M. L. McCorkle*, for defendants.

CLARK, J.: By the decree of August Term, 1885, the fund was paid into the Clerk's office by judicial order, to abide further directions of the Court. This made the Clerk, on his official bond, responsible for its safe-keeping. *Thomas* v. *Connelly*, 104 N. C., 342. By the decree of November Term, 1885, to which the heirs at law were parties, it was adjudged that the Clerk pay over the fund to plaintiff, as administrator, as assets for payment of debts of his intestate. This judgment has not been complied with. The failure to do so is a breach of the bond, for which the other defendants, who were sureties on the official bond, are liable. They were sureties when the money was paid in and when the order to pay out was made, and the condition of their bond has not been performed. It clearly can make no difference that the heirs had an interest in the fund when paid in, for the fund was paid to the Clerk, by order of the Court, to abide future directions. The obligation of the Clerk, upon his bond, was for its safe-keeping and the payment as directed by the Court. No one except the plaintiff has a right to recover the fund, or sue for the breach of the bond in failing to pay it as directed. The heirs at law of Sharpe are bound by the judgment of the Court of November, 1885, condemning the fund to use of plaintiff as assets for payment of debts of his intestate. Nor does it make any difference whether the fund was converted before December 1st, 1886 (when Connelly gave a new bond, on which the other defendants are not sureties), for there was a breach of the bond from November Term, 1885, by failure to execute the judgment, and that liability was not discharged by the Clerk giving a new bond in December, 1886. There was, therefore, no error in the refusal to give the instructions asked.

Affirmed.

*J. W. C. LONG v. W. A. WALKER.

Constitution—Contract—Costs—Homestead and Personal Property Exemptions—Judgment—Execution Sale—Lien—Stare decisis.

1. One C., as executor, recovered judgment against the defendant on a debt due to his testator by contract before the year 1867, and caused execution to issue. The defendant paid to the Sheriff the principal and interest of the judgment, and took his receipt therefor (not including costs). The Sheriff sold the land of defendant, already levied on to satisfy the costs, at which sale plaintiff bought and brings this action to recover possession: *Held*, that the right to recover disbursements, in case of default in payment, being secured by law, when the contract was made, entered into and formed a part of it, and such costs as incidents of the judgment constitute a lien upon the same property, and to the same extent, as the principal and interest of the debt.
2. This lien exists in favor of the officers of the Court when they do not require the plaintiff, as they have a right to do, to pay their fees in advance. In such instances the officers (Sheriff and Clerk of the Court) have the right of retainer to the extent of the costs out of the amount collected, and neither can be compelled to look exclusively to the plaintiff's prosecution bond, nor prevented from exhausting his remedy against the debtor, by reason of any receipt or compromise between the judgment creditor and debtor.
3. The receipt given in this case did not operate, like the receipt of principal and interest of a debt, while suit is pending for its collection, to extinguish plaintiff's claim against defendant for the costs incident to the action, in the absence of some special agreement to the contrary.
4. If the sale of defendant's land under the execution would have been valid without allotting him a homestead thereon, when the principal and interest of the debt had not been paid, the estate of the debtor passed to the plaintiff under the sale to satisfy the costs due by virtue of the execution.
5. A creditor by contract has a vested right either to the remedy for the recovery of his debt, that existed when the contract was made, or another sufficient remedy in its stead.

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*Head-notes by AVERY, J.

6. In altering the remedy a State cannot, by law, impair its efficacy in the least degree, because the right to impair means a license to destroy.

7. Before the year 1867 the creditor could cause execution to issue against the real and personal property of the debtor, and if there were no personal goods, or, in the opinion of the Sheriff, not sufficient to satisfy the debt, the officer was required to levy upon and sell, without embarrassment to the creditor, the whole body of the debtor's land, if necessary, and at all events his entire interest in that sold.

8. If the new remedy, as compared with that provided when the contract was made, has a tendency to diminish the value of the debt in the least degree, it is unconstitutional.

9. If the creditor is required to pay the costs of allotting any homestead in advance and of selling successively the excess, the reversion and the homestead itself, and incurs the risk of paying such expenses without reimbursement, if the proceeds of all do not pay his debt, the value of the debt is diminished by the sum total of such expense and by the decreased amount realized by selling the reversionary interest and homestead separately.

10. It impairs the remedy and diminishes the value of the debt if neither the plaintiff in execution, nor any other person, can cause the land to bring its value at sale without allotment of the homestead, and buy it without incurring the risk of having the validity of the sale successfully impeached after the lapse of years, by a finding of a jury that the land was worth over one thousand dollars when sold.

11. The value, in the year 1867, was the amount the land would bring under execution, and the purchaser at such a sale got a good title, unless fraud, such as preventing a fair competition of bidders, was shown, and the burden was then on one who attacked the sale for fraud to prove it, while under the principle laid down in *Morrison* v. *Watson* the burden would rest forever on a purchaser at a sale without laying off a homestead to show the true value of land bought to have been less than one thousand dollars, or have his deed declared invalid.

12. After the decision in the case of *Edwards* v. *Kearsy* (96 U. S., 100), this Court and the Legislature of the State declared the Act of 1869 unconstitutional as to debts contracted before the 24th of April, 1868, and the liabilities of citizens were settled by the sale of land to satisfy debts created before that date without allottment of homesteads.

13. The general policy of adhering to the last decision of a Court is subject to the limitation that inadvertent decisions must be overruled, unless they have been acted on for a long time, and property has been bought because of the public faith in the principle decided.

14. Where the adjudications of a Court in construing a statute or the organic law seem to have been wrong originally, but have been recognized as authority for years, and titles to property have been accepted through faith in their stability, they become a sale of property and ought, for the sake of certainty to be observed as if they had originally formed a part of the text of the statute.

15. Where a creditor, acting upon the principle laid down in *Morrison* v. *Watson* has caused the debtor's homestead to be laid off and sold, first the excess, then the reversionary interest in the homestead, and then the homestead itself, all such sales are valid.

16. The case of *Morrison* v. *Watson*, 101 N. C., 332, is overruled in so far as it declares a sale under execution to satisfy a debt, arising out of a contract made before the 24th of April, 1868, void for failure to lay off the homestead of the debtor.

This was a CIVIL ACTION, tried at the May Term, 1889, of the Superior Court of IREDELL County, before *Brown, J.*

The plaintiff claimed under a Sheriff's deed, executed September 5, 1887. The Sheriff sold by virtue of an execution issued on a judgment against the defendant, rendered on a cause of action *ex contractu*, that arose prior to the year 1867. But while the execution was in the hands of the Sheriff, the defendant Walker paid to the plaintiff, in the execution of the principal and interest of the judgment, but no part of the costs, and took his receipt in form as follows:

"Received of W. A. Walker one hundred and forty-nine $\frac{82}{100}$ dollars in full payment of the principal and interest of the debt (not including costs) in the judgment of the Superior Court of Iredell County in the case of John F. Long and W. H. Cowan, administrators of W. F. Cowan, deceased, *against* G. W. Weir and wife, W. A. Walker and others. This 30th day of March, 1887

(Sig.) WM. H. COWAN, Ex'r of W. F. Cowan."

The Court submitted, without objection, the issues herein set out, which, with the findings of the jury, are as follows:

1. At the date of the execution sale, did the defendant occupy the lands described in the complaint as one farm and tract and reside thereon and cultivate and use the same as such? Answer, Yes.

2. Was the principal and interest of the judgment and execution under which the lands were sold, paid to the plaintiff therein in full before the sale, and did he satisfy and discharge said principal and interest? Answer, Yes.

3. If so, did plaintiff Long have notice at time and before said sale that said principal and interest had been fully paid? Answer, Yes.

4. What was the value of said lands at date of said sale? Answer, $1,900.

5. What is the annual value or rents of the part thereof called "Luck" land? Answer, $45.

6. What was the value of the part of said lands described in complaint called "Walker" land? Answer, $1,450.

After the issues were found by the jury, the plaintiff moved for judgment for the part of the land described in complaint as the Luck tract of land, plaintiff admitting that he was not entitled to recover the other part of the land known as the Walker land. Plaintiff also moved for judgment for rents of Luck land from date of purchase, September 5th, 1887. The plaintiff contended:

1. That it was unnecessary to assign the defendant's homestead because the judgment was rendered on a debt contracted prior to 1868.

2. That plaintiff disclaiming as to the tract called the Walker tract, the defendant would have all he was entitled to under the constitutional provision, and that plaintiff would, in any event, be entitled to the tract called Luck tract.

3. That although the jury find the second issue against the plaintiff, yet the costs remain unpaid, and that although said costs are admitted to have accrued since the year 1868, still they are an incident to the original debt.

The defendant inherited the Walker tract of from 250 to 300 acres from his father, and bought the Luck tract of 50 acres, many years ago, and added to it. He lived on the Walker tract, and still lives on it; but for many years prior to the sale, and since he bought the Luck place, has used the two as one farm, had a single fence that enclosed the cultivated lands on both tracts, and had the two listed as one tract for taxation.

There was judgment for the defendant, from which plaintiff appealed.

Mr. D. M. Furches, for plaintiff.
Mr. W. M. Robbins, for defendant.

AVERY, J.—after stating the facts: The law in force before the year 1867, when the contract between the testator of Cowan, the plaintiff in the execution, and the defendant Walker was made (Rev. Code, ch. 31, sec. 75), provided that, on default in payment, judgment for the debt, with "full costs," should be awarded to the payee in a suit brought for its enforcement. The statutory right to recover not only principal and interest, but disbursements incident to the prosecution of the action, therefore entered into and formed a part of the original agreement between the creditor and debtor, just as though the provisions of the law had been incorporated in it, and was, in legal intendment, one of the inducements to the former to loan the money or part with the property that constituted the consideration of the contract. Cooley's Const. Lim., p. 285; *Koonce* v. *Russell*, 103 N. C., 179; *Von Hoffman* v. *City of Quincy*, 4 Wall., 535.

The costs taxed by the Clerk when judgment is rendered, and that accruing in favor of the Sheriff while the execution is in his hands, may be collected by the officers in advance of discharging the duty, from the plaintiff, and the law gives the plaintiff a lien upon the same property, and to the same extent, for the security of his disbursements as for the principal and interest of his debt. Freeman, in his work on Judgments, § 338, says: "The lien of a judgment attaches to all the interests which the debtor had at the rendition of the judgment. A subsequent sale, under the judgment, *relates back*, so as to *transfer all the title* which the debtor had *when the lien attached. But where costs are incurred in enforcing a lien, they are to be paid out of the proceeds realized, and are preferred to the lien.*" See also Shelly's Appeal, 38 Penn. St., 210; *McNeill* v. *Bean*, 32 Vermont, 429.

But the case of *Knight* v. *Whitman*, 6 Bush. (Ky.), 51, is directly in point, and is decisive of the doctrine that the costs incident to the collection of a debt, and the enforcement of a judgment for it, are deemed to constitute a part (if not a favored part), of the debt, and any property liable to be subjected to the lien for the judgment debt may be sold for the costs. The Court of Kentucky say, in the opinion referred to: "It is insisted that, this judgment being in 1867, the homestead not being worth one thousand dollars, was not liable to sale under this execution, but was protected by our statute of February 10th, 1866, which enacted that, in addition to the personal property now exempt from execution on all debts and *liabilities*, created or *incurred after the first of June*, 1866, there shall be exempt from sale under execution, &c., so much land, including the dwelling-house, &c., owned by the debtor, as shall not exceed in value one thousand dollars. * * * Then it has been judicially ascertained that the defendant was liable to plaintiff when said suit was brought in 1865, and anterior to June 1st, 1866, therefore said homestead exemption statute is inapplicable.

* * * It is said, however, *that the costs were subsequently* incurred, hence the homestead was not liable therefor. It is sufficient to say, that the exemption under the statute of February, 1866, is only applicable to debts and liabilities created or incurred after June 1st, 1866, so that in all that class of cases existing prior thereto there is no homestead exemption. *The costs of all such cases are only incidents attached thereto, and must be governed by the laws applicable to the debt or liability out of which they grow.*" The only difference material for the purpose of this discussion between the homestead provision of our Constitution and the Kentucky statute, is that the latter, by its express terms, did not apply to antecedent liabilities, while the former was limited in its operation by the construction given it by the Supreme Court of the United States, as to contracts made subsequent to its adoption. In *Slaughter* v. *Winfrey*, 85 N. C., 160, which was an action by a landlord to enforce a lien for rent against his tenant, the late Chief Justice SMITH says, for the Court: "As the act requires the seizure of a sufficient part of the crop to meet the plaintiff's demand, and costs as well, it is obvious that both must be satisfied out of the proceeds of sale, when so adjudged by the Court. If it were otherwise, the rent would be practically reduced *by the cost incurred in obtaining it*, and to this extent the ample *security*, intended by the statute, be impaired by the use of the *necessary means of making it available* to the landlord."

But it was suggested, rather than contended, on the argument by defendant's counsel, that, though costs incident to the judgment may be collected, along with principal and interest, and retained out of the proceeds of a sale under execution by the Sheriff and Clerk, still the payment of principal and interest of the judgment to the creditor would destroy the lien of the incident, just as the receipt by a plaintiff from a defendant, without any specific agreement as to costs, of the full amount of a debt demanded in an action pending for its collection, has been held to discharge the latter from liability to a judgment for costs of such suit. There is a wide difference, however, between the relations of the parties after the rendition of judgment and prior thereto. After judgment, the officers of the Court acquire the right to enforce the collection of their fees, and to all the security for the payment of them that the plaintiff had for his judgment debt, and, in addition, a right, in some instances, of retainer out of funds in the Clerk's office. *Clerk's Office* v. *Allen*, 7 Jones, 156; *Clerk's Office* v. *Bank*, 66 N. C., 214.

In *Clerk* v. *Wagoner*, 4 Iredell, 131, Chief Justice RUFFIN, delivering the opinion of the Court, says: "It has been usual for the officers of the Court to indulge the successful party for his costs until a return of his execution therefor against the party cast. If raised *on that execution, the officers, instead of the party, receive them.* It is clear that every party may be required to pay his own costs as they are incurred, or at any time when demanded. * * * In *Lockman's* case, 1 Dev., 146, it is true the execution against the successful party was not moved for until a return of *nulla bona* on a *fi. fa.* against the party cast." The Clerk has the right to retain the Court costs out of the amount returned by the Sheriff as net proceeds of sale after deducting his fees, and neither of them can be compelled, by reason of any compromise made by the judgment creditor with the debtor, to look exclusively to the former on his prosecution bond, or prevented from exhausting his remedy against the latter by the issue of execution and a sale of such property as may be found liable to be subjected under it.

It is manifest, therefore, that if the Sheriff was not required by law to have a homestead allotted to the defendant in his land, and levy first on the excess, if any, to satisfy the execution before the debt was paid to Cowan, it was no more essential to the validity of the sale that it should have been done afterwards and before selling under the execution when only costs remained unpaid.

"The obligation of a contract is the law which binds the parties to perform their agreement." *Sturges* v. *Crowningshield*, 4 Wheaton, 122. "The prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden." *Von Hoffman* v. *City of Quincy*, 4 Wall., 535 (7 Myer's Fed. Dec., sec. 1879). Looking to the governing principle, as settled by the Supreme Court of the United States, we find that the touchstone for testing the constitutionality of a statute, requiring a pre-existing creditor to pay for the appraisement and allotment of exemptions to his debtor before he can cause a levy to be made upon the property of the latter, is found in the question whether the enforcement of the law throws the smallest impediment in the way of the collection, or in the slightest degree diminishes the value of the claim below what it would have been if no such trouble and expense were incident to the sale.

The right of the States to alter the remedy has this limit, that they must not impair it, because the right to impair means a license to destroy. *McCulloch* v. *Maryland*, 4 Wheaton, 416; *Edward* v. *Kearsy*, 96 U. S., 600. "The obligation of a contract includes everything within its obligatory scope. Among these elements, nothing is more important than the means of enforcement. This is the breath of its vital existence. * * * One of the tests that a contract has been impaired is that its value has by legislation been diminished. *Ibid*, 600 and 601.

Upon the principle to which we have already adverted, the plaintiff in execution (Cowan) had a right to enforce the collection of his judgment in the manner and by the machinery provided by law when the debt was contracted, unless a new remedy had meantime been substituted by law, which would enable him to subject the property of the debtor with as little embarrassment as under the former law, and without any diminution in the value of his judgment due to the new method of proceeding. Before the year 1867, the creditor could cause execution to issue on his judgment (under the provisions of ch. 45, secs. 1 and 2 Revised Code) against the lands as well as the personal goods of the debtor, and if there were no personal property, or, in the opinion of the Sheriff, not enough to satisfy the judgment, the officer would levy upon and sell, without expense or embarrassment, the whole body of his land, if necessary, and, in any event, his entire interest in that sold. Instead of this speedy, unrestricted remedy against the property of the debtor of every species, afforded by law when the contract was made, the creditor is now restricted to the circuitous method of selling the property by piece-meal, pointed out in *Morrison* v. *Watson*, 101 N. C., 340, and is subject to delay, hindrance and chances of serious loss by being forced to pay in advance all the costs of appraising the personal property exemptions and allotting the homestead preliminary to any sale and satisfaction at all, unless where he will assume the risk of showing the debtor's land is worth less than one thousand dollars. The requirement that a creditor must submit to this new exaction, not in contemplation of the parties when the contract was made, must, of necessity, diminish the value of the debt in the ratio of the risk, the outlay of money and the hindrance attending the prescribed method of collection, as compared with that incident to it under the law in force before the year 1867. To the extent of the diminution in the value of the debt, or the delay or hindrance caused by the change in the law, the remedy is impaired. *Bronson* v. *Knight*. 1 How., 311; *Evans* v. *Montgomery*, 4 Watts & S. (Pa.), 218; *Reade* v. *Frankfort Bank*, 23 Mo., 518; *Carson* v. *Arkansas*, 15 How., 513; *Oatman* v. *Bond*, 15 Wis., 28; *Mundy* v. *Munroe*, 1 Mich., 76. "The rule seems to be that in modes of proceeding and forms to enforce the contract, the Legislature has control and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions and restrictions as seriously to impair the value of the right." *Tenn.* v. *Sneed,* 6 Otto, 69. "A creditor by contract has a vested right to the remedies for the recovery of the debt, which existed at law when the contract was made, and the State Legislature cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. *Memphis* v. *United States,* 7 Otto, 295.

But conceding, merely for the sake of argument, that it is doubtful whether the change in the remedy made in the construction placed upon *The Code,* §§ 502–508, in *Morrison* v. *Watson, supra,* is such as to bring the law within the inhibition of Art. I, § 10 of Constitution of the United States, as an unwarranted modification, still reason and public policy combine to dictate a return to the principles laid down by this Court and acted on in the adjustment of rights of property in the general settlement consequent upon the decision in *Edwards* v. *Kearsy, supra* (October, 1887). Prior to the publication of the ruling in that case, this Court had uniformly held the exemption laws embodied in Art. X of our Constitution, and the statutes enacted in pursuance of it, applicable alike, whether the appraisement was made necessary by a judgment arising on a contract entered into anterior or subsequent to the adoption of the Constitution on April 24, 1868; but a new judicial departure was rendered imperative when the foundation upon which the Court had been building for nine years was so suddenly swept away. Accordingly, in *Gheen* v. *Summey,* 80 N. C., 187, Justice ASHE, delivering the opinion of the Court, says: "The Act of April 7, 1869, being void as to debts contracted prior to the 24th of April, 1868, then *all the provisions of that act, with regard to the machinery for carrying out the provisions of the*

Constitution are void as to the same class of debts." At the same term (January, 1879), but earlier, this Court decided *Earle* v. *Hardie*, 80 N. C., 177, the first case in which this question of the validity of the Homestead Machinery Act (Battle's Rev., ch. 55, Act of April 7, 1869), as applied to contracts created before April 24, 1868, was discussed after the decision in *Edwards* v. *Kearsy*, and the Court said: "The second section of Art. X of our Constitution of 1868 having been declared void as against debts previously contracted, the Act of the Legislature, passed on the 7th of April, 1869, * * * to carry its provisions into effect, *is also void.*" The same principle was held at that term in *Gamble* v. *Rhyne*, 80 N. C., 183, to apply to the personal property exemption, and in more decided language (at the January Term, 1880) in *Carlton* v. *Watts*, 82 N. C., 212, where the Court says: "This being an old debt, contracted in 1860, the defendant was not entitled to the exemption of five hundred dollars guaranteed by the Constitution, but only to such exemption as was secured to him by the law existing at the date of the contract." Again, at October Term, 1882, in *Wilson* v. *Patton*, 87 N. C., 318, this Court recognized the validity of a sale without allotting a homestead, because three of the seven executions under which the Sheriff sold were issued on judgments rendered on old debts and in adjusting the distribution of the proceeds of sale the Court held that all of the fund might be applied, if required, in satisfaction of the three judgments; but that an equivalent in money of one thousand dollars must be treated as the homestead against the other debts, thus again reiterating in substance the principle first laid down in *Earle* v. *Hardie*. In *Grant* v. *Edwards*, 86 N. C., 513, it was again announced that the Act of 1869 was not intended to apply where execution issued on old debts.

As is clearly demonstrated by Justice Davis, in his dissenting opinion in *Morrison* v. *Watson*, 101 N. C., 340, the case of *Albright* v. *Albright*, 88 N. C., 238, was decided upon a principle that in no way involved this question; and in that of *Arnold* v. *Estis*, 92 N. C., 162 (February Term, 1885), the decision rested on the ground that the sale was made to satisfy a new, as well as an old debt, and was held invalid for that reason, while the Court cited, and expressly approved, the four rules laid down in *Mebane* v. *Layton*, 89 N. C., 396, one of which was that a sale to satisfy an old debt could be lawfully made without laying off the homestead of the debtor. So in *Miller* v. *Miller*, 89 N. C., 402, there is an intimation (which is entirely *obiter*) of the view subsequently taken by a majority of the Court in *Morrison* v. *Watson*, 101 N. C., 332, but the sale of the land to satisfy an old debt, without allotting a homestead, was held valid.

So that, apart from some unnecessary intimations, there was an unbroken line of authorities adhering to the doctrine enunciated in *Earle* v. *Hardie* down to *McCanless* v. *Flinchum*, 98 N. C., 358, where a majority of the Court declared, and the subsequent case of *Morrison* v. *Watson*, 101 N. C., 332, in which a majority of the Court held that it was essential to the validity of the sale of land under execution issuing on a debt originating before the adoption of the provision contained in Article X of the Constitution, that a homestead be allotted to the execution debtor, unless it clearly appeared that, at the time of the sale, the debtor did not own lands subject to execution of the value of one thousand dollars. In that case, too, the Court say: "The charge given is obnoxious to no just complaint of the plaintiff, for it requires him to show that the lands were worth less than one thousand dollars, the maximum allowed for homestead, increased by the debt, interest and cost."

The same creditor who, prior to the year 1867, could cause to be sold under execution, free from vexatious delay, the whole of his debtor's land, without regard to its value, dare not now sell without incurring the costs of allotment of homestead, unless he is not only assured himself, but is confident that he will be able to satisfy any jury called upon to try the issue of title for an indefinite period in the future, that the land was not worth, at the time of sale, more than the sum of one thousand dollars, with the Court costs and that of allotment added. The burden is cast upon him to show that the value was less, or have the sale declared void. Consequently, though the judgment debt may amount to many thousands of dollars, if the creditor finds that the estimates of different persons as to the value of the debtor's land vary from eight hundred to two thousand dollars, he cannot afford to buy himself, nor can he induce others to purchase the land at execution sale until it is valued by appraisers at his expense. If, by selling the excess, if any, and then the allotment, the sum realized is still insufficient to pay the whole debt, the creditor has been compelled to make a disbursement that he will now lose, and to which, under the old law, he would not have been subjected. For the purpose of adjusting the rights of creditor and debtor under the old law, the criterion of the value of land was the amount it would bring at a fair and open sale at public auction by virtue of the execution, and unless such sale could be successfully impeached for fraud, as in preventing a fair competition of bidders, the purchaser got a good title without regard to the amount of his bid. If an attempt had been made to set aside such sale on the ground that competition of bidders was suppressed, the presumption of law would have been in favor of its validity, and the party alleging fraud would have been required to prove it to the satisfaction of a jury. But, under the doctrine laid down in *Morrison* v. *Watson*, *supra*, the purchaser at a sale made without laying off the homestead, because the creditor believed the land worth less than one thousand dollars and costs, buys with the burden (without regard to the price for which the land actually sells) of satisfying a jury, even in the distant future, that it is not worth one thousand dollars and costs. Common observation has taught us that the estimates of juries as to value in such cases are as widely variant as the opinions of witnesses on the same subject, and yet, if the estimate of value exceeds one thousand dollars and costs by even one dollar, the deed of a purchaser at such sale must be declared void.

It cannot be successfully contended that the testator of Cowan would not have been placed in such a dilemma as would have greatly embarrassed him in pursuing his remedy and probably have decreased the value of his judgment, had not the defendant Walker been unwilling to risk the validity of a sale for the principal and interest of the debt. The plaintiff who bought at the sale for costs occupies the same position as if the land had been sold for the debt as well as costs, and the officers of the Court were not bound to advance the money necessary to lay off the homestead and incur the risk of reimbursement. The bill of costs must have been very small if it did not exceed the plaintiff's bid of ten dollars. It is the folly of the debtor if, by reason of the uncertainty as to the validity of the sale, the land brought less than its value. He ought to have paid the costs when he paid the debt. The fact that the Court so construes *The Code* as to impose upon the creditor or other purchaser, as the case may be, a new burden that would not have attached to a sale under the former law, or to require him to make, at his peril, inquiries and acquire information as to values, clogs the sale with conditions, and is manifestly calculated to diminish the value of the debt and interfere seriously with its collection.

The question, whether we shall adhere to the rule, for the first time distinctly stated in *Morrison* v *Watson*, *supra*, at the September Term, 1888, of this Court, or overrule that case and sustain the unbroken current of authority recognized for nearly ten years previous, is one of no little moment to the people of the State. From the time when the decision in the case of *Earle* v. *Hardie* was published, in January, 1879, it was accepted as the basis of proceedings to collect probably thousands of judgments on old claims, for the satisfaction of which all the land of the debtor had been declared liable in *Edwards* v. *Kearsy*. The idea that there would be stability in these first decisions was strengthened by the legislative construction given by the Act of 1879, ch. 256, ratified March 14th, 1879 (that being the first General Assembly that met after the publication of the opinion in *Edwards* v. *Kearsy*). The preamble of the act declares that, "Whereas, the Supreme Court of the United States, in the case of *Edwards* v. *Kearsy*, decided at the October Term, one thousand eight hundred and seventy-seven, that the personal property exemptions and homesteads provided for by sections one and two, article ten, of the Constitution of North Carolina, were inoperative in respect to debts and obligations contracted prior to the adoption of said Constitution; and whereas, doubts exist whether the various statutes providing for the exemption of property from execution, which were in force at the date of the adoption of said Constitution, have not been repealed," &c.

The act, then, assuming the Constitution and machinery for allotting homesteads to be void as to debts contracted before the Constitution was adopted, provides that debtors, as against such claims, may have set apart to them such homestead as not to exceed one thousand dollars in value, and such personal property, not to exceed five hundred dollars, as they may have been entitled to under any law in force before the adoption of said Constitution, &c. This statute is worthy of grave consideration, both as a contemporaneous legislative construction of the law, and because it was calculated, considered with our decisions mentioned, to induce, and did induce, persons to buy land sold for old debts without allotment of homestead. In fact, upon an examination of the Act of 1879 and chapter 10 of *The Code*, and comparing them with chapter 137, Acts of 1868–'69 (Battle's Rev., ch. 55), it will be found that there has been no statute in force since the passage of the Act of 1879, requiring, or authorizing, a Sheriff or other officer to lay off and set apart a homestead before levying upon the real estate of the execution debtor, where the execution is for the collection of a debt contracted prior to April 24, 1868; for chapter 10 of *The Code*, which is substantially a re-enactment of chapter 256 of the Acts of 1879, and so much of chapter 137 of the Acts of 1868–'69 as provides the machinery for carrying it into effect, among other things provides (sec. 501, sub-sec. 3), "that property, real and personal, as set forth in Art. X of the Constitution of the State," shall be exempt from sale under execution "upon debts contracted and causes of action accrued since April 24, 1868," and while § 502 of *The Code* purports to be a re-enactment of § 2, ch. 137 of the Acts of 1868–'69, it, in fact, so alters and amends that section, as will be seen by comparing them, as to make it conform to the Act of 1879 by providing that the Sheriff, or other officer, charged with the levy of execution, shall summons appraisers, &c., "before levying upon the real estate of any resident of this State who is entitled to a homestead under this chapter," &c ; and "this chapter" (*The Code*, ch. 10) only entitles the execution debtor to the homestead exemption "upon debts contracted or causes of action accrued since April 24, 1868." The words, "entitled to a homestead under this chapter," are not in § 2, ch. 137 of the Acts of 1868–'69, and they limit the Sheriff's duty in laying off the homestead before levy to executions "upon debts contracted, or causes of action accrued since April 24, 1868," as provided "under this chapter" (*The Code*, ch. 10, § 501, sub-sec. 3); thus amending the provisions of the Act of 1868–'69 (which this Court, following the decision in *Edwards* v. *Kearsy*, had declared unconstitutional) so as make the machinery for laying off the homestead conform to the Act of 1879 and the ruling in *Edwards* v. *Kearsy*.

This is not the ordinary case in which the doctrine of *stare decisis* can be invoked as furnishing a sufficient reason for sustaining the last adjudications of the Court. The general policy of adhering to the declared opinions of the Court is subject to the limitation that inadvertent decisions should be overruled, unless they have been acted on for a long time and property has been bought by reason of the public faith in the stability of the principle decided in them. The legislative and judicial constructions of the Constitution, made first in the year 1879, led to sales under the advice of counsel at every court-house in the State in disregard of the Act of 1869, and the lands bought, had, under the confidence, strengthened by repeated subsequent adjudications, been transmitted by descent and conveyed by deeds with covenants of warranty, until now it is probable that many thousands of people will be seriously damaged if a Sheriff's deed, constituting an essential link in their claims of title, is to be held void because this Court has modified its explicit construction of the homestead laws, in conformity with which the sale was made by the Sheriff. It will make no difference to the numberless intermediate purchasers, who paid full value on the advice of counsel predicated upon the opinion of this Court, whether the land originally sold under execution for ten or for ten thousand dollars. Neither the question whether we will adhere to the settled interpretation of the Federal Constitution, nor whether we should protect those who invested money or incurred pecuniary liability, under the reasonable belief that the Homestead Machinery Act of 1869 had been declared null and void, can be dwarfed or magnified in importance as principles in the ratio of increase or decrease in the amount of the bid at public vendue.

In holding, as we do, that the sale is valid and the plaintiff's title to the "Luck Place" good, he having disclaimed as to the other tract, we restore vitality to numerous titles for which persons have been induced to expend their money by the plain declaration of this Court that the Machinery Act of 1869, "so far as it provides for laying off and allotting homesteads against debts contracted prior to the 24th of April, 1868, the date of the adoption of the Constitution, is void." *Gheen* v. *Summey, supra.*

On the other hand, the rule was laid down in *Wyche* v. *Wyche*, 85 N. C., 96, that a purchaser at a sale of land, made by a Sheriff in 1869 under execution, to satisfy an old debt, subject to the homestead, took the land with the incumbrance, and the whole tract having been allotted to the debtor, that only the reversionary interest passed to him. In the cases of *Corpening* v. *Kincaid*, 82 N. C., 202, and *Lowdermilk* v. *Corpening*, 92 N. C., 333, it was settled that the creditor, in selling to satisfy an old debt, might recognize the homestead (in that case allotted) for the benefit of the "homesteader," and sell the reversionary interest before the passage of the Act of 1870, forbidding a separate sale of said interest. This principle is in no way dependent on the *obiter* intimation given in the latter case of the subsequent holding in *Morrison* v. *Watson.*

It will be conceded that the act forbidding the sale of the reversionary interests is as certainly invalid and unconstitutional as the provision of the organic law exempting the homestead as a prohibition against proceedings to collect debts created before April 24, 1868. But, while the creditor may sell the entire interest of the debtor, passing to the purchaser the fee-simple and driving the debtor from his home, it is clear that, under the rule and reasoning in *Wyche* v. *Wyche*, *Barrett* v. *Richardson* and *Lowdermilk* v. *Corpening, supra*, if he permit the Sheriff, as his agent, in mercy to the debtor, to sell, "subject to the homestead" (allotted or unallotted), the sale is valid and passes the reversionary interest only. In *Barrett* v. *Richardson*, 76 N. C., 423, Justice READE, for the Court, says: "The defendants claim the land, discharged of the homestead, upon the ground that the debts for which the land was sold were contracted prior to the adoption of the Constitution, and that, therefore, the plaintiff had no right to claim a homestead as against those debts. Grant that for the sake of argument, and grant that the plaintiffs in these executions might have had the lands levied on and sold, yet they were not obliged to do it, and did not do it. On the contrary, the levy, sale and Sheriff's deed were 'subject to the homestead.'" If, therefore, the proceedings to collect old debts have been conformed within two years past to the opinion of the Court in *Morrison* v. *Watson*, it is manifest that not a single title, derived from sales so made, will be rendered invalid by reason of the fact that the decision in that case is now overruled only in so far as it declares a previous allotment of a homestead in any case essential to the validity of a sale made to satisfy a debt contracted before April 24th, 1868. Whether the creditor has caused the debtor's land to be sold "subject to the homestead," or has sold the excess only, after allotting the homestead, or where the excess failed to bring a sum sufficient to satisfy the debt, has proceeded further to sell successively fractional parts of the homestead itself, in order to favor the debtor, the purchaser, in any and all of these cases, has taken a title not defeasible because of any irregularity in the manner of selling.

Where the adjudications of a Court, in construing a statute or the organic law, seem to have been wrong originally, but have been recognized as authority for years, and titles to property have been accepted through faith in their stability, such judicial declarations become a rule of property. Lord Mansfield said: "When solemn determinations, acquiesced under, have settled precise cases and become a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute." *Wyndham* v. *Chetwynd*, 1 Burrow, 419; *State* v. *Thompson*, 10 La. Ann. Rep., 122; Sedgwick on Statutory and Constitutional Law, 254; *Scott* v. *Kenan*, 94 N. C., 296; *Grantham* v. *Kennedy*, 91 N. C., 148; *Young* v. *Jackson*, 92 N. C., 144; *Gilpelke* v. *Dubuque*, 1 Wall., 175.

There is error. The Court should, upon the findings of the jury and the admissions, have allowed plaintiff's motion for judgment in his favor for the possession of the land known as the "Luck Place," and for costs. The judgment of the Court below is reversed, and judgment must be entered in favor of the plaintiff for a writ of possession for said "Luck Place," and rents of that place, and for costs.

Error.

MERRIMON, C. J., dissenting: I feel constrained to differ very widely from my brethren in this case. I dissent from the judgment of the Court, much of the reasoning of the opinion, the interpretation given therein to numerous decided cases, and the overruling of several other cases, decided after much and earnest consideration.

It seems to me very clear that this case, like that of *Hughes* v. *Hodges*, 102 N. C., 236, and going beyond it in important respects, further narrows, impairs and unsettles the right of homestead, as established and contemplated by the Constitution, while it unnecessarily renews and enlarges the conflict of decision on a subject—that of homestead—that has given the Court not a little trouble in the past, and will likely continue to do so. Moreover, it manifests an inconsiderate disregard of decided cases that cannot fail to result in more or less detriment to the public, and lessen confidence in the uniformity and stability of the decisions of this Court, something very serious in its nature and greatly to be deprecated.

The decision must result in grievous injustice to the defendant. Under the decisions of this Court, prevailing in pertinent and material respects at the time the sale and deed under which the plaintiff's claims were made, they were absolutely void. This case overrules those cases and makes such sale and deed valid, and, as a consequence, the defendant loses his tract of land, which the jury found to be worth several hundred dollars, and the plaintiff gets it for the nominal price of ten dollars! I think the cases so overruled were correctly decided, but even if their correctness were questionable they should not be overruled. If they were in conflict, to some extent, as contended, with former decisions, the later ones should prevail and be observed. Otherwise, there can be no end to such conflict, and the result must be deplorable.

I will state some of the grounds of my dissent more in detail. The plaintiff contends earnestly, that inasmuch as the debt, to satisfy which the defendant's land was sold, was contracted before the present Constitution of this State took effect, the laws of the State in respect to the right of homestead and the homestead, do not apply; that, as to this debt, they are inoperative and void, because, as he insists, they impair the obligation of the contract, and are thus in conflict with the Constitution of the United States, and he cites and relies mainly upon *Edwards* v. *Kearsy*, 96 U. S. Rep., 595, which case went from this Court.

It must be observed that the Supreme Court of the United States did not, in terms or effect, decide in the case just cited that the judgment debtor was not entitled in any case to have his homestead valued and laid off to him as allowed by the Constitution and laws of this State, if the debt on which the judgment was founded was contracted before the present State Constitution took effect. It simply decided, in substance and effect, and no more, that the homestead thus valued and laid off could not "be exempt from sale under execution or other final process obtained on any" such debt, if it were *necessary* to the satisfaction of the debt, because to allow it to be so exempt would impair the obligation of the contract. Obviously, the Court did not decide, nor intend to decide, that in such a case the debtor could not have his homestead, if he had property, real or personal, subject to levy and sale sufficient to satisfy the debt without resorting to his homestead. Thus, if the debt were five hundred dollars, and the debtor had land of the value of two or five thousand dollars subject to the satisfaction of the debt, other than the homestead, the Court did not decide that the latter would not in such case be exempt from such sale; nor did it decide that in such case the proceedings, whereby the homestead was valued and laid off, were void necessarily. If there were property sufficient to satisfy the debt without resorting to the homestead the latter would be exempt, because in that case the obligation of the contract would not be impaired, and the laws of the State in respect to homestead would not be in conflict with the Constitution of the United States The Constitution of the United States and the Constitution of this State, and the laws of the latter, are not unnecessarily to be interpreted and treated as in conflict. On the contrary, the constitutional provisions and statutory regulations of the State on any subject will be allowed to operate and have just effect, unless they in some way materially interfere with, abridge or impair the powers, authority and guarantees established and secured by the Constitution of the United States. *Packet Co.* v. *Keokuk,* 95 U. S. Rep., 80; *Allen* v. *Louisiana,* 103 U. S. Rep., 80; *Austin* v. *Alderman,* 7 Wallace, 694. The Constitution and laws of the United States, and the same of the several States, are not presumed to be at all in conflict; on the contrary, they are presumed to be in harmony, and, in material respects, are to be interpreted and treated as harmonizing as far as reasonably and justly they may be. Nor will the Courts of the

United States unnecessarily ignore and treat as inoperative and void constitutional provisions and statutes of the several States. On the contrary, it is their duty to give, and they will give, them effect when and where they can properly do so. *Clark* v. *Smith*, 13 Pet., 195; *Claflin* v. *Hoaseman*, 93 U. S., 130. Hence, the Court, in the case already cited, said cautiously: "It is to be understood that the encroachment thus denounced must be *material*. If it be not *material*, it will be regarded as of no account." The Court said further: "The remedy subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects the remedy as *substantially* to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

The suggestion that this Court has made decisions since *Edwards* v. *Kearsy, supra*, was decided, not in harmony with it, is certainly unfounded. On the contrary, it has, uniformly, in many cases, expressly recognized that case, and substantially, in all material respects, applied the law as expounded and settled by it, as the cases presently to be cited, and other cases, abundantly show. Giving effect to the constitutional provisions and statutory regulations in respect to homestead, the Court has decided in numerous cases that debts contracted before the present constitutional provision establishing the right of homestead took effect, do not *necessarily* prevail against the homestead—that they do not unless it is necessary to their satisfaction to sell it; and it has also so interpreted the statutory regulations in respect to the valuation and laying off the homestead as to give them practical effect. The Court has, as we shall see, made no decision that impairs the right of such creditor, or that materially delays or cripples the enforcement of that right. It has only administered the right of homestead of such debtor as far as this might be done consistently with the paramount right of such creditor.

In *Albright* v. *Albright*, 88 N. C., 238, the late Justice RUFFIN said: "The plaintiff has a clear constitutional right to his exemptions in both his realty and personalty, and this right he has against each and every one of his creditors without regard to the date of his demand. It is a mistake to suppose that the law giving such exemptions is necessarily void as against debts existing prior to its adoption. It is only so in case there should not be a sufficiency, after allowing the exemptions, fully to satisfy them, whereby they would be defeated. Otherwise they are operative and constitutional as to them as against any other demand whatever; that is to say, the debtor has a *right to have his allotment made*, setting apart specifically his homestead and his exemptions, and then to have the creditor, though his claim be an old one, to exhaust all his other possessions of every kind before he shall put his hands on them. *Cheatham* v. *Jones*, 68 N. C., 153; *Burton* v. *Spiers*, 87 N. C., 87." This the present case expressly overrules.

In *Miller* v. *Miller*, 89 N. C., 402, the Court said: "But where the homestead does not prevail, the debtor takes what is left after the debt is paid. If nothing is left, the laying off the homestead would have nothing to operate upon and it would be useless. It would be otherwise, however, if the debtor had property sufficient to pay the judgments whose liens ante-date the last mentioned judgment, for the law favors the homestead; and if the debt, that may, *if need be, prevail against it*, can be paid without selling it, this must be done. The classes of debts that prevail against the homestead do not so prevail *necessarily and at all events*, but they do so only when to sell it is necessary to pay them. If the personal property over the exemption and the real property of the debtor will more than pay the judgment that prevails against the homestead, then and in that case the homestead should be laid off so that the excess may first be sold, and the Sheriff will be in peril if he fails to have this done. * * * It may happen that the debtor will get a homestead of less value than one thousand dollars." The substance and pertinent part of what is thus said is also overruled by the present case.

In *Lowdermilk* v. *Corpening*, 92 N. C., 333, the late Chief Justice SMITH said: "Indeed, the homestead exemption is not void as to either class of debts, and it only becomes so as to such as were contracted before it became a law, when otherwise the latter could not be collected out of other property of the debtor. Such other property ought first to be appropriated, and, if sufficient, the debtor allowed to avail himself of the benefit of the constitutional provision made in his behalf." *Cobb* v. *Hallyburton*, *id.*, 652; *Morrison* v. *Watson*, 101 N. C., 336; *Wilson* v. *Patton*, 87 N. C., 318; *Butler* v. *Stainback*, *id.*, 216, are to the same effect, and there are other like cases. These cases are all overruled in the respect now under consideration.

The appellant lays much stress on what is said in *Gheen* v. *Summey*, 80 N. C., 187; *Grant* v. *Edwards*, 86 N. C., 515, and *Keener* v. *Goodson*, 89 N. C., 273. But these cases, in their substance, properly understood and interpreted, do not contravene what is said and decided in the cases just cited, *supra*, and quoted from. They decide, generally and properly, that debts contracted anterior to the Constitution prevail against the homestead; and it is further said in them, in general terms, that it is not necessary to value and lay the same off. But the question now under consideration was not raised or adverted to at all in them, as it was in numerous cases afterwards. The Court did not then, or at any time afterwards, so understand. The Judge who wrote the opinion of the Court in those cases, and the same Judges who decided them, made most of the subsequent decisions cited, *supra*, and, in doing so, so far as appears, never supposed for a moment that they were overruling them, as, really, they were not. Indeed, in deciding the subsequent cases referred to, they were, as to the subject now under consideration, simply passing upon new aspects of the subject of homestead as they were from time to time presented. So that, *Gheen* v. *Summey* and *Grant* v. *Edwards*, *supra*, and perhaps other cases more or less like them, prove nothing to the present purpose.

It thus appears from a multitude of decisions of this Court that the debtor, in a proper case, may have the homestead valued and laid off to him, although the debt be one that may, if need be, prevail against it, and there is not a single decision, properly understood, to the contrary.

The Constitution (Art. X, §§ 2, 8) gives and secures the right of homestead, and the statute (*The Code*, §§ 502, 524) prescribes how the homestead shall be valued and laid off to the owner thereof. The purpose thus expressed is a lawful one, and the constitutional provisions and statutory regulations cited are, in their general application, valid, although, in some particular respects, they may not be. They are not, on this latter account, void, and hence must prevail and have effect as far and in as full measure as practicable. A statute wholly void cannot operate at all, but when its purpose is lawful, and it may operate in some of its material parts and in material respects, it must be allowed to have effect and be enforced to such extent as it has validity.

Now, as we have seen, one otherwise entitled may have his homestead, although he owes a debt that may, *if need be*, prevail against and take it for satisfaction thereof. Why shall the homestead in that case not be valued and laid off to the debtor in as full measure as practicable? No substantial reason has been given why it should not be. The statute does not provide, by exception or otherwise, that it shall not be. On the contrary, it, in effect, provides affirmatively that it shall be. The constitutional provision and the statute, intending to give the homestead, encounter the objection that the owner thereof owes a debt that, if need be, prevails against it; then, and in that case, the purpose of them is to give it as far and as fully as practicable. In view of the generous and wholesome purpose of the Constitution, such interpretation is just and reasonable and necessary, and there is neither statute nor decision to the contrary. The contention of the plaintiff is, that in such a case the land of the debtor must be sold, without valuing and laying off the homestead, although the debtor might have land enough in addition to and other than the homestead to pay the debt twice over! It is said that in such case the law of homestead does not apply at all, and, therefore, all proceedings in that respect are nugatory and void! Such a view surely ought not to be allowed to prevail. In such a case, the debtor ought not to be put to the inconvenience, and perhaps great sacrifice, of having his whole tract sold. It would be wholly unnecessary, and the law, properly applied, does not allow it to be done; it intends that the homestead shall be valued and laid off and the remainder sold.

It is contended further, that the statute (*The Code*, § 501, paragraphs 1, 2, 3, 4, which classify debts and provide certain exemptions as to them,) suggests and implies that the debtor is not entitled to have his homestead valued and laid off to him as to debts contracted anterior to the present Constitution. This contention is founded in serious misapprehension. The statute just cited re-enacts and brings forward in *The Code* certain statutory exemptions from sale under execution that prevailed before the present Constitution took effect, the purpose being to secure them to the debtor, if for any reason he could not have the benefit of the exemptions given and secured by the present Constitution. This appears from the statute itself, and more particularly from the preamble to the statute (Acts 1879, ch. 256).

The statute (*The Code*, §§ 502–524), prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by implication or otherwise, as to any debt or class of debts; it allows and in legal effect requires, that the homestead shall be valued and laid off in every case where it may be done.

But, if the contention of the plaintiff as to the statutory exemptions referred to were more plausible than it is, it could not be allowed to prevail: because the exemption of the homestead, and the right to have the same in whole or in part, in as large or as small measure as may be allowed, exists and has effect, not by virtue of the statute, but perforce of the Constitution. It gives, secures and exempts the homestead, as far as may be, within the limit it prescribes. It is supreme and controlling, and it is the duty of the Courts to be prompt and diligent in giving it effect in as large measure as may be done. The spirit and purpose of the Constitution so require, and the decisions of this Court have generally harmonized with such spirit and purpose.

It is further insisted that the statute does not provide for valuing and laying off the homestead in such a case. And, in two or three particulars, it does not, in terms. But the purpose of the Constitution and the statute is clear, and the latter must be so interpreted as to effectuate that purpose, if this be at all practicable. This the Court endeavored to do in *McCanless* v *Flinchum*, 98 N. C., 358, and that case, in this respect, was afterwards expressly approved in *Morrison* v. *Watson*, 101 N. C., 332, although Mr. Justice DAVIS dissented in both cases

It is also insisted that the method of valuing and laying off the homestead, in such case, impairs the obligation of the contract. This objection has no substantial force. Clearly the Legislature may change methods of procedure as it may deem proper, if it does not *materially* change the existing methods adversely to the creditor, without impairing such obligation. It has been so uniformly decided by the Supreme Court of the United States, as well as by this Court and other State Courts, in many cases. Here, the creditor is not delayed at all. If need be, he takes the whole homestead to pay his debt and costs, and he is at once, upon the sale of the land, reimbursed the money—costs—he is required to advance. The costs are trifling in amount and could not reasonably be regarded as materially affecting the substance of the remedy of the creditor; they are simply not an unreasonable incident of the change of procedure. *Louisiana* v. *New Orleans*, 102 U. S. Rep., 203.

It has been decided in numerous cases that a sale of land by the Sheriff in cases where, under the law, he is required to have the homestead valued and laid off to the judgment debtor, and he fails to do so, is generally void and the deed of the Sheriff passes no title. There could scarcely be a more striking illustration of the propriety and importance of the rule thus settled until now, than the present case. The plaintiff undertook to purchase land, which the jury found to be of the value of nineteen hundred dollars, for twenty dollars! He took the Sheriff's deed and now insists upon his purchase!

I need not here re-state the reasons that led the Court to make such decisions. It is sufficient to cite several cases in which they may be readily found. They are cogent, founded upon principles of justice, sound public policy and strong statutory provisions. *Mebane* v. *Layton*, 89 N. C., 396; *Arnold* v. *Estis*, 92 N. C., 162; *McCanless* v. *Flinchum*, 98 N. C., 358; *McCracken* v. *Adler*, 98 N. C., 400; *Morrison* v. *Watson*, 101 N. C., 332.

The plaintiff contends that the land was sold as two distinct tracts, and he is entitled to that one on which the defendant does not live, claiming benefit of the exception pointed out in *McCracken* v. *Adler*, *supra*, as to land "separate and distinct from the homestead property, and not necessary to make the homestead complete, as allowed by the statute." Surely this case cannot be treated as coming within that exception. The jury found the fact that the two tracts adjoined each other, and the defendant cultivated and used them as one farm. The two tracts were not separate and distinct in the sense of the exception; hence the price—ten dollars—bid for each! Obviously, the plaintiff regarded the sale as an adventure, and others regarded it as a mockery of a serious proceeding. It turns out to be serious indeed to the debtor defendant.

The defendant did not relieve himself of the incidents of the debt by paying the principal and interest of the judgment. The remedy and the Court costs incident thereto were of the debt, the contract contemplated and embraced them, and they partook of its nature. Hence, the judgment for the costs was on the same footing as the judgment for the principal and interest of the debt. The plaintiff has the same remedy against the defendant's land for costs that he had for the principal debt.

It was, according to the cases pertinent cited, the duty of the Sheriff to have the defendant's homestead valued and laid off as the law prescribes. As he failed to do so, the sale of the land and the deed relied upon by the plaintiff were void. The Court, however, have now decided otherwise—that, as to debts contracted anterior to the present Constitution, the debtor is not entitled to have his homestead valued and laid off to him, and that a sale of the land under execution as to such debt is valid, without regard to the homestead. I do not think so.

It is difficult to determine the compass of the decision in this case. How does it affect sales of land as to debts contracted after the Constitution became operative? Are they valid where the homestead was not valued and laid off to the debtor before the sale? If so, would the bidders at such sale bid a fair price for the land, not knowing where the homestead might afterwards be laid off, and how much it might embrace? These are important questions.

A. W. SHAFFER v. A. HAHN et al.

This case involves the principle decided in *Long* v. *Walker*, *ante*, in overruling *Morrison* v. *Watson*, 101 N. C., 332.

This was a CIVIL ACTION to recover land, tried at February Term, 1889, of the Superior Court of BEAUFORT COUNTY, before *Boykin, J.*

His Honor being of opinion, upon the evidence introduced by plaintiff, that he was not entitled to recover, the plaintiff submitted to judgment of nonsuit and appealed.

Messrs J. H. Small and *W. B. Rodman, Jr.*, for plaintiff.
Mr. Charles F. Warren, for defendants.

AVERY, J.: It was conceded on the argument that the only point in this case was that fully discussed in the opinion in *Long* v. *Walker, ante,* whether a sale of land, by virtue of execution, to satisfy a judgment on a debt created prior to April 24th, 1868, without allotting a homestead, and where the debtor owned no land except that sold, was void or valid.

This case presents no new phase of the question; but the land in controversy having been sold to satisfy a large number of judgments, and being, according to the testimony, worth ten thousand dollars, we assume that if it did not sell for a large sum at the Sheriff's sale, subsequent purchasers, including the plaintiff, have paid a price approximating its full value. The facts in the case at bar, therefore, illustrate the position stated in *Long* v. *Walker*, that while the amount involved there was insignificant, the principle was one that had influenced numerous and heavy expenditures of money for several years previous to the year 1888.

For the reasons stated in the opinion referred to, the judgment of nonsuit must be set aside and a new trial granted.

Error.

MERRIMON, C. J.: This case comes clearly within the rule adopted by the Court in *Long* v. *Walker*, decided at the present term. I dissented in that case and do not deem it necessary or proper to dissent further here, although I see not the slightest reason to modify my views of dissent. The majority of the Court have the authority to apply that rule as from time to time cases come before the Court for adjudication, and it is my duty to recognize and submit to that authority, although my individual views may not harmonize with those of the Court.

I will add here that at the time the sale and the Sheriff's deed executed in pursuance of it, in question in this case, were made, the Constitution, the statutes and the decisions of this Court in respects pertinent and prevailing, expressly required that the homestead of the debtor in this case, as in all others like it, should be valued and laid off to him before the sale of the land. The case of *Edwards* v. *Kearsy*, U. S. R., was not decided until the lapse of years afterwards. The Sheriff, the purchaser, subsequent succeeding purchasers, and all other persons had full knowledge of the law, and if they failed to observe it, this was their own *laches* and folly.

It was the duty of purchaser, and subsequent succeeding purchasers, to see that the law has been observed in all respects pertinent as to sales, judicial and otherwise, affecting the title to the land.

I am very sure that the number of persons who might be prejudiced by holding sales void in cases where homestead was not valued and laid off to the debtor before the sale, as required by the statute, is greatly exaggerated, but if it were infinitely greater than it really is, this could be no sufficient reason for what I conceive to be, and what the Court in the past deemed, ignoring and disregarding a plain provision of the Constitution and statutes enacted to give it practical effect.

*F. C. FISHER v. THE CID COPPER MINING COMPANY.

Removal of Cause — Cost of Transcript.

When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed. at the next term thereof, and before the term of the Court in the county to which it was removed, to direct that the action be dismissed if the costs of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript.

APPEAL by plaintiff from an order of *Philips, J.*, at September Term, 1888, of DAVIDSON Superior Court.

Mr. F. C. Fisher (by brief), for plaintiff.
Mr. C. B. Watson, for defendant.

CLARK, J.: The following order was made at June Term, 1888, of Davidson Superior Court, by *Connor, J.*

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*Head notes by CLARK, J.

"On motion of plaintiff, supported by affidavits, it is ordered by the Court that this cause be removed to the Superior Court of Forsyth County for trial, and set down upon the docket of said Court for trial on Thursday of the second week of Fall Term, 1888."

And at September Term, 1888, of Davidson Court, the following order was made by *Philips, J.:*

"In this cause, it appearing to the Court that at the last term of this Court, on motion of plaintiff, an order was made for the removal of this cause to the Superior Court of Forsyth County; and it appearing to the Court that the plaintiff has failed to pay the Clerk's cost for making out transcript of the cause, it is now, on motion of the defendant, ordered that unless the said costs be paid by the plaintiff within fifteen days from the service of this motion upon Fred. C. Fisher, the plaintiff, and also of counsel for plaintiff, that the order for removal be revoked, and this cause stand dismissed at plaintiff's cost."

Upon the order of removal being made at June Term of Davidson Superior Court, the jurisdiction of that Court ceased, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. *The Code,* § 195 (3). *The Code,* § 1371, makes one exception to this rule, by providing that after the removal, subpœnas for witnesses and commissions to take depositions may issue from either Court. In *State* v. *Reid,* 1 D. & B., 377, RUFFIN, C. J., says: "After a cause has been transferred from one Court to another, whether by appeal or change of venue, the Court from which it has gone cannot proceed further in it. Whatever purports to be posterior to the loss of jurisdiction, is therefore erroneous, and probably void," and cites *Murry* v. *Smith,* 1 Hawks, 41.

The term of Forsyth Superior Court to which the cause was removed was held the latter part of October. The plaintiff was entitled till the first day of that Court to deposit his transcript. If an imperfect transcript was deposited, a *certiorari* would issue to Davidson, and probably, also, if no transcript was deposited, upon proof of the order of removal. Upon such *certiorari*, the Superior Court of Davidson has the power to amend its records, if there are any defects. *State* v. *Swepson*, 81 N. C., 571; *State* v. *Reid*, *supra*, and cases cited in the latter case. Or the defendant might have waited until the term of Davidson Superior Court held next after the term of Forsyth Court, in which the transcript should have been filed, and then, upon proof of failure of compliance in that regard, he might have had the order of removal struck out. In *Avery* v. *Pritchard*, 93 N. C., 266, the Court says, in regard to a case removed by appeal: "After the lapse of time within which the appellant ought to have docketed his appeal in this Court, the Superior Court might, upon proper notice, have adjudged that the appellant had abandoned his appeal, and proceeded in the action as if it had not been taken." If the plaintiff did not pay the costs of the transcript, after demand, the Clerk might have had judgment against him for them, or he might refuse to deliver the transcript till costs are paid, and the plaintiff would lose his removal, or his appeal, as the case might be." *Andrews* v. *Whisnant*, 83 N. C., 446; *Bailey* v. *Brown*, at this term.

But we know of no authority in the Court of Davidson, before the term of Forsyth, to which the cause was removed, without notice, to order plaintiff to pay the costs of the transcript within fifteen days, under penalty, in case of failure, of the action standing dismissed. The order was *coram non judice*. Although the jurisdiction of Davidson Superior Court might have been exercised at the term next after Forsyth Court had been held, when, upon proof that plaintiff had not executed the order of removal by depositing the transcript, it might have struck out such order and proceeded as if such order had not been made, not even then would it have been authorized, for that cause, to dismiss the action. Treated simply as a judgment to set aside the order entered at June Term, it could not have been made without notice. *Seymour* v. *Cohen*, 67 N. C., 345; *Sutton* v. *McMillan*, 72 N. C., 102; *Lyon* v. *McMillan*, 72 N. C, 392. A party is fixed with notice of all judgments and orders made in a cause pending in Court, but not with notice of a motion to set aside a final judgment or an order of removal, since the cause is no longer pending in that Court. In these cases he is entitled to notice. As the execution of the order of removal has been interrupted by this appeal, the plaintiff is entitled to execute it by depositing his transcript in Forsyth Superior Court on or before the next term in May. If he fails to do so, the defendant can proceed at the next term of Davidson held thereafter, as indicated in this opinion.

Error.

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*D. ROSE, Trustee, v. H. E. SHAW et al.

Appeal—Docketing Transcript.

When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee, upon filing the certificate required by Rule 17, is entitled, upon motion, to have the appeal docketed and dismissed.

This was an APPEAL by plaintiff from a judgment by *MacRae, J.*, at December (Special) Term, 1889, of CUMBERLAND Superior Court, confirming the report of commissioners appointed to lay off dower.

No counsel for plaintiff.

Mr. N. W. Ray, for defendant.

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*Head-note by CLARK, J.

CLARK, J.: The appellant has failed to docket his appeal during the week assigned for causes from the district to which it belongs. The appellee files the certificate of the Clerk of the Superior Court required by Rule 17, and moves to docket appeal and have it dismissed. It appears from the certificate that the judgment was rendered at December (Special) Term, 1889, of Cumberland Superior Court, and that, upon disagreement of counsel, the case on appeal was settled by the Judge and filed January 31, 1890, and that the Clerk made out a certified copy of said statement, together with a transcript of the record, and delivered them to counsel for appellant in ample time to have been transmitted to this Court before the close of the call of causes from that district. The motion to docket and dismiss must be allowed. See *Bailey* v. *Brown*, at this term.

Motion allowed.

*CLEM BAILEY v. C. H. BROWN.

Appeal—Transcript—Clerk's Fees—Rule 17.

1. If an appeal is not docketed before the call of that district, at next term of this Court, is concluded, the appellee, upon exhibiting the certificate of the Clerk as required by Rule 17, may docket and have the appeal dismissed. Head note in *Bryan* v. *Moring*, 99 N. C., 16, corrected.
2. It is the duty of the Clerk within twenty days after the case on appeal is filed in his office to send up a transcript to this Court (*The Code*, § 551), but not unless his fees are paid by the appellant: *Semble*, that leave to appeal *in forma pauperis* does not excuse appellant from paying costs of transcript.
3. If the transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, the appellee may move to docket and dismiss the appeal.

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*Head-notes by CLARK, J.

ACTION, tried before *Bynum, J.*, and a jury, at November Term, 1889, of LENOIR Superior Court.

The transcript was not filed before the call of causes from that district was concluded, and at the close of the call the counsel for appellee exhibited the certificate of the Clerk of Lenoir Superior Court showing the names of the parties to the action, the time when the judgment and appeal were taken, the name of the appellant, and the date of settling appeal, and moved, under Rule 17 of this Court, to docket appeal and have it dismissed.

Mr. N. J. Rouse, for plaintiff.
No counsel for defendant.

CLARK, J.: The certificate of the Clerk, filed as required by Rule 17, shows that the action was tried at November Term, 1889, of Lenoir Superior Court; that on disagreement of counsel the case on appeal was settled by the Judge, and filed in the Clerk's office February 12th, 1890; that the Clerk made out the transcript of the record on appeal, and on February 18th, and repeatedly since, has notified appellant that the transcript is still in his office, and it has not been sent up because he has not paid the costs of transcript and the necessary postage thereon. The call of causes from that district in this Court was concluded on March 13th. The motion to docket and dismiss must be allowed. *Cross* v. *Williams*, 91 N. C., 496; *Avery* v. *Pritchard*, 93 N. C., 266; *Rollins* v. *Love*, 97 N. C., 210. The appellant is the moving party. The burden is on him to show that if the appeal is not docketed in time it is no fault of his. When, for instance, the Judge failed to settle the case in time to get the appeal here before the perusal of the docket for that district, it was held to be appellant's duty to bring up the record without the case on appeal, docket it, and move for a *certiorari*, else the appeal will be dismissed. *Pittman* v. *Kimberly*, 92 N. C., 562.

In a proper case, on motion, the delinquent would be given time to show excuse for his failure to docket appeal in time. *Walker* v. *Scott*, 102 N. C., 487. But here there is no excuse for appellant, as it was his duty to pay the costs of transcript (*Andrews* v. *Whisnant*, 83, N. C., 446), and the appellee is entitled to have an end to the litigation. It is not made to appear that this was an appeal *in forma pauperis;* but we may note that § 553, allowing an appeal as a pauper, merely excuses appellant from filing the bond, or making the deposit required to secure the adversary party for the costs of the appeal. The Court held, in *Martin* v. *Chastine*, 75 N. C., 96, that this did not excuse such appellant from payment of his own costs in this Court. It would seem from this that one who appeals as a pauper must pay all his costs of the appeal, including costs of transcript, and for the reason, given in that case, that the trial in the Superior Court is presumed to be right, and the public officers are not called upon to render gratuitous services to impeach the result of the trial already had. Indeed, § 553, allowing appeals without bond, is similar to § 237, allowing defendants in actions of ejectment to defend without giving bond, under which it has been held that such defendant is liable for, and also may recover, costs. *Justice* v. *Eddings*, 75 N. C., 581, and *Lambert* v. *Kinnery*, 74 N. C., 348. Both sections differ in these respects from § 212, allowing a party to *sue* as a pauper, which excuses such party from paying fees to any officer and deprives him of the right to recover costs. It is held, however, that even that section does not excuse the pauper from liability for his witnesses. *Morris* v. *Rippy*, 4. Jones, 533; *The Code*, § 1368. We advert to this, as it is a matter which frequently comes up on circuit, and it is possible that its discussion here may save the appellant the expense of an application to re-docket or for a *certiorari*. The head-note in *Bryan* v. *Moring*, 99 N. C., 16, is calculated to mislead.

The Court did not hold that if the appeal was not docketed before the perusal of the district, the appeal would not be dismissed on motion upon certificate as allowed by Rule 17. What it did hold was, that if such motion to docket and dismiss was not made by appellee during the call of the docket from the district, and such appeal should thereafter be docketed by appellant during such term, being the first term of this Court after the trial below, the Court would not dismiss on motion of appellee, but would continue the case.

Motion allowed.

J. M. HODGES v. BARBARA HILL et al.

Justice of the Peace—Jurisdiction—Married Woman.

A Justice of the Peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage.

This was a CIVIL ACTION, begun before a Justice of the Peace, and tried before *Graves, J.*, at February Term, 1890, of LENOIR Superior Court.

From judgment dismissing the action, plaintiff appealed.

Mr. N. J. Rouse, for the plaintiff.

Messrs. H. E. Shaw and *Clement Manly*, for the defendants.

CLARK, J.: The only question presented is whether a Justice of the Peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. This is not an open question. It has been held that he has. *Neville* v. *Pope*, 95 N. C., 346. *The Code*, §1823, expressly provides that the liability of a *feme sole* "shall not be altered or impaired" by her marriage. *Dougherty* v. *Sprinkle*, 88 N. C., 300, which holds that a Justice of the Peace has not jurisdiction of an action against a married woman, applies only to liabilities incurred by her while a *feme covert*, and not even to them in cases where she is a free trader, or the proceeding is to enforce a laborer's lien. *The Code*, §§1790, 1828, 1831 and 1832; *Smaw* v. *Cohen*, 95 N. C., 85.

Error.

*W. DUKE v. F. D. MARKHAM.

Agency—Deed, Execution by Corporation—Ratification.

1. The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. An agency to execute a mortgage given in this manner gives no validity to the mortgage. It is not the corporation's act, which can only be authorized in the mode required by law.
2. The use by the company of money raised by such mortgage would not of itself be a ratification. If the company ratify the mortgage, it would not validate it as to other creditors if mortgage is invalid when registered.
3. When a mortgage by a corporation is signed by the president, secretary and two stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowledged by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors.

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* Head-notes by CLARK, J.

This was a CIVIL ACTION, tried at January Term, 1890, of the Superior Court of DURHAM County, before *Armfield, J.*

The plaintiff offered as a witness, Paschal Lunsford, who testified that he is Register of Deeds of Durham County, and there appears upon the books in his office a mortgage, registered and recorded by him on November 15th, 1888, purporting to be executed by the Durham Sash, Door and Blind Company to Washington Duke, the plaintiff.

Plaintiff offered the mortgage in evidence.

Defendant objects. Objection overruled and exception by defendant.

L. W. Grissom, a witness for the plaintiff, testified that he was secretary and treasurer of the Durham Sash, Door and Blind Manufacturing Company on November 15th, 1888; he signed the mortgage of that date as secretary and treasurer. There is no record in the minutes kept by him of the proceedings of the board of directors or the meetings of stockholders in regard to this mortgage, or authority to make it. He kept in a book (produced in Court) the proceedings of the board of directors of the corporation and of the stockholders; the resolutions and orders of said boards; the corporation had a president, vice-president and board of directors; the stockholders, officers and directors lived in the town of Durham; before this mortgage was executed, he went around and saw the stockholders separately in regard to executing it; he did not see all the stockholders or directors; he saw a majority of them; they had no meeting, but each one he saw authorized him to execute the mortgage; the plaintiff requested the president and two stockholders to sign the mortgage; this was done; Mr. Duke signed the note for $3,000, and witness got the money from the Raleigh National Bank; the money was used in the business of the corporation; he said nothing more to the stockholders or directors; the directors were stockholders; the note has never been paid; it sometimes happened that we could not get a meeting of the board of directors; they did not attend the meetings regularly; the mortgage was delivered to W. Duke immediately.

W. A. Wilkerson, a witness for the plaintiff, testified that he was a stockholder and director of the Durham Sash, Door and Blind Company, November 4th, 1888; he signed the mortgage to Mr. Duke; he did not know anything about the authority by which it was executed except what the witness Grissom had told him.

The mortgage was made to raise money to meet expenses of the concern. Defendant renewed his objection to the mortgage and requested the Court to exclude it. The Court overruled defendant's objection and admitted the mortgage. Defendant excepted.

Defendant introduced in evidence sundry executions issued from the Superior Court of Durham County, which executions were admitted by plaintiff, as set forth in his answer. Defendant introduced the judgment docket of the Superior Court of Durham, showing the docketed judgments upon which the executions were issued.

The defendant, being sworn as a witness in his own behalf, testified that he was Sheriff of Durham County, and as such, and by virtue of sundry executions issued to him against the Durham Sash, Door and Blind Company, he levied, on September 4th, 1889, and September 5th, 6th and 7th, 1889, in the morning, on the property described in his levy, it being the property described in the mortgage to plaintiff.

Defendant requested the Court to charge the jury that the plaintiff could not recover the property included in the mortgage of November 15th, 1888, because the mortgage had been executed without authority of the corporation and was not the act of the corporation, because it had not been executed by an agent duly authorized thereto, and because (if the act of the corporation) it had not been properly registered, the probate being insufficient and void.

His Honor charged the jury that the mortgage was valid and the plaintiff entitled to recover all the property except the material mentioned therein; that the description of this property was too vague.

Defendant excepted and appealed from the judgment rendered against him.

Messrs. R. B. Boone and *W. A. Guthrie*, for plaintiff.
Messrs. J. S. Manning and *F. L. Fuller*, for defendant.

Clark, J.: This was a claim and delivery proceeding brought against defendant, who, as Sheriff of Durham County, had taken possession of certain personal property of a corporation—the Durham Sash, Door and Blind Manufacturing Company—by virtue of executions in his hands, and had advertised the same for sale. The plaintiff claims the property by virtue of the mortgage of November 15th, 1888, given to indemnify him against loss as surety to said company upon a note to the bank, which would fall due November 15th, 1889. The conclusion of the mortgage and the probate are in the following words:

"In witness whereof, the Durham Sash, Door and Blind Manufacturing Company sign by the names of president, secretary and treasurer, and two stockholders, and attest their seals.

"W. F. Remington, President.
"L. W. Grissom, Sec. and Treas.
"W. A. Wilkerson, Stockholder.
"Walter Wilkerson, Stockholder.

"Witness:
"Geo. W. Watts."

"North Carolina—Durham County.

"The execution of the foregoing instrument was this day acknowledged on the part of L. W. Grissom, and proven on the oath and examination of L. W. Grissom as to W. F. Remington, W. A. Wilkerson and Walter Wilkerson. Let the same, with this certificate, be registered.

"This November 15th, 1888.

"D. C. MANGUM, C. S. C."

We think his Honor erred in admitting the mortgage in evidence upon such probate, and likewise in instructing the jury, upon the proof offered by plaintiff, that it was valid as to creditors whom defendant represented by virtue of the executions in his hands.

In *Pierce* v. *New Orleans Building Co.*, 9 La., 397, it is held that the act of a majority of the stockholders, expressed elsewhere than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation. The same is true of a meeting of which notice is not given. *Stow* v. *Wyse*, 18 Am. Dec., 99, and notes; Cook on Stockholders, § 594; 1 Potter on Corporations, § 336, and notes.

In *Leggett* v. *N. J. M. & B. Co.*, 1 Saxton, ch. 541, it is held that a corporation is only bound by an agent's acts when within the scope of his authority, and that a president and cashier, as such, cannot execute a mortgage of corporate property without special authority from the board of directors or the stockholders, and that the proceeds of a mortgage have been applied to the use of the corporation in paying its debts, or otherwise, is not sufficient to render the mortgage binding if its execution was not properly authorized.

"The members of a corporation cannot, separately and individually, give their consent in such manner as to bind it as a collective body, for, in such case, it is not the *body* that acts; and this is no less the doctrine of the common than of the Roman Civil Law. Being *lawfully assembled*," says Ayliffe, "they represent but one person, and may consequently make contracts, and, by their collective assent, oblige themselves thereunto. And though all the members of a corporation covenanted on behalf of it under their private seals," this, it was held, would only bind them *personally*, and not the corporation. Angell & Ames on Corporations, § 232, which is supported by the numerous cases there cited. Again, in the same work, § 504: "The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with corporate powers." Indeed, the authorities upon this subject are numerous, uncontradicted, and supported by reason.

It is true the common seal is *prima facie* evidence that a deed or contract is the act of the company, and that the seal has been affixed by authority, though it is competent to go behind the seal and show that it was not affixed by legally exercised authority of the company. In this case there was no common seal of the company attached. While a seal is not essential to the validity of a chattel mortgage, in the absence of the company's seal there is no presumption of its being the corporation's act, and it devolves upon the party relying upon the mortgage to show that the agent or officer had authority to execute it. The plaintiff's witness testifies that there was no resolution of stockholders or directors to authorize the mortgage, and no record to that effect is entered on the books of the company, that he went around privately and saw a majority of the stockholders, and they authorized him to execute the mortgage, and that he requested the president and two directors to sign. A corporation can only act in the manner authorized by law. If, by the meeting of stockholders (or of the directors, if they have, by the charter, the right), the secretary of the company had been authorized to execute this mortgage, or mortgages generally, the mortgage might have been valid; but, as we have seen, no authority can be derived in this irregular manner, by an officer going around privately to what he alleges was a majority of the stockholders and getting their consent. There is nothing to show that they were a majority and that they did consent, as would be the case if a meeting were regularly held, the vote taken and a minute entered on the company records. To give validity to such proceedings would lead to irremediable evils and abuses. The corporation seal not being attached, it was incumbent on the plaintiff to look to the authority of the agent with whom he dealt. Since it was not in the scope of the secretary's authority, as such, to execute the mortgage, and no legal authority to execute the same especially was given, it goes for naught. The receipt and use of the money is not of itself, as we have seen, a sufficient ratification by the corporation. But it is immaterial here whether there was a subsequent ratification or not. Ratification would be good between the corporation and the mortgagee, but would not validate, as to other creditors, a mortgage which was invalid when registered.

The mortgage is not good at common law for want of authority to the secretary to execute it, nor is it good as a statutory mortgage under *The Code*, §685, for there is no common seal attached as required by that section, and the probate shows that as to the president and the two stockholders there was no legal proof of its execution by them. They neither acknowledged the same, nor was it proven by the examination of the subscribing witness, as required by *The Code*, §1246 (1). Indeed, under the words of the statute, *The Code*, §685, it may be that more than one witness is necessary. In *Todd* v. *Outlaw*, 79 N. C., 235 (237), BYNUM, J., says: "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant, for doing so. *Williams* v. *Griffin*, 4 Jones, 31; *Burnett* v. *Thompson*, 3 Jones, 113; *Lambert* v. *Lambert*, 11 Ired., 162;

Carrier v. *Hampton*, 11 Ired., 307. Not having been duly proved, the registration was ineffectual to pass the title as against creditors or purchasers. *Robinson* v. *Willoughby*, 70 N. C., 358; *Fleming* v. *Burgin*, 2 Ired. Eq., 584; *DeCourcy* v. *Barr*, Busb. Eq., 181." To same effect is *Evans* v. *Etheridge*, 99 N. C., 43.

Error.

*W. DUKE v. F. D. MARKHAM.

Corporation—Chattel Mortgage.

Any conveyance or mortgage of its property executed by any corporation is void and of no effect as to the creditors of said corporation existing at the time of the execution of said deed or mortgage, and who shall commence proceedings to enforce their claims against the corporation within sixty days after registration of the conveyance.

This was a CIVIL ACTION, tried before *Armfield, J.*, at January Term, 1890, of DURHAM Superior Court, for claim and delivery of certain personal property which the defendant, as Sheriff of Durham County, under executions in his hands against the Durham Sash, Door and Blind Manufacturing Company, a corporation, had seized as the property of said corporation and advertised to sell to satisfy said executions.

The plaintiff (as to this appeal) claims by virtue of a chattel mortgage executed to him by said corporation, September 4, 1889, and registered the same day. It was in evidence that the executions were already in the hands of the Sheriff, and had been levied on other property of the corporation when this mortgage was executed by it as indemnity to plaintiff to secure him from loss on a note of the company to which he was surety, and which would fall due November 15th, 1889. The defendant took into possession the property in controversy under said executions on September 5th and 6th, 1889.

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* Head-note by CLARK, J.

The Court held that this mortgage was not valid against the executions levied by defendant, because it had not been registered sixty days, and comes within the terms of the *proviso* in § 685 of *The Code*, and recited a debt of $2,000 in favor of the plaintiff as the consideration, when no such debt was, in fact, due the plaintiff, and directed the jury to find the issues as to this mortgage in favor of the defendant.

To this ruling the plaintiff excepted. Judgment in favor of defendant for all the property described in the mortgage of September 4th, 1889, from which judgment plaintiff appealed.

Messrs. W. A. Guthrie and *R. B. Boone*, for plaintiff.
Messrs. J. S. Manning and *F. L. Fuller*, for defendant.

CLARK, J.: *The Code*, § 685, provides that "any conveyance of its property, whether absolutely or upon condition, in trust or by way of mortgage, executed by any corporation, shall be void and of no effect as to the creditors of said corporation existing prior to or at the time of the execution of said deed," provided such creditors shall commence proceedings to enforce the claims against said corporation within sixty days after the registration of such conveyance. It is not controverted here that the defendant, as Sheriff, seized the property of the corporation under valid executions against it, which were already in his hands when the mortgage under which plaintiff claims was executed. The statute is explicit, and the power of the Legislature to enact it is unquestioned. The argument *ab inconvenienti* was forcibly presented by the appellant's counsel. That is a matter which addresses itself to the legislative department and not to the Courts. It is sufficient for us to say, "*Ita scripta est lex.*" The Court below properly held the mortgage void as to executions in defendant's hands.

Affirmed.

*ORPHEUS McADOO v. RICHMOND & DANVILLE RAILROAD COMPANY.

Tort—Negligence—Issues—Verdict—Trial—Pleading.

1. In actions arising *ex delicto* there is no degree of negligence that can be described by the word "gross" alone; but when an *injury* is due directly to the wanton or wilful act of another, he is not absolved from liability by the concurrent negligence of the injured party, as he is not, where, by the exercise of ordinary care, he could, notwithstanding the fault of the injured party, have saved the latter harmless.
2. It is not proper to treat the word "gross" as synonymous with wilful, malicious or fraudulent.
3. Where plaintiff alleged in his complaint that he was returning from his place of business to his home, along defendant's track, "as he had been in the habit of doing for several years without objection from the defendant, within the corporate limits of the town of Greensboro, *when, owing to the gross negligence of the defendant's servants*, he was struck from behind by a locomotive engine, belonging to the defendant, &c., and thrown from the track was thereby much injured," and the jury, in response to the first issue, found that the plaintiff was "injured by the negligence of the defendant, *as alleged*": *Held*, that the verdict meant only that the defendant, by failure to exercise ordinary care, injured the plaintiff.

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*Head-notes by AVERY, J.

4. When, in such case, in answer to a second issue, the jury found also that the plaintiff, by his own concurrent negligence, contributed to cause the injury: *Held*, that the plaintiff was not entitled to judgment upon the whole verdict.

5. In framing issues for the jury it has been settled (1) that only issues of fact raised by the pleading must be submitted to the jury; (2) that the verdict, whether upon one or many issues, must establish facts sufficient to enable the Court to proceed to judgment; (3) of the issues raised by the pleadings, the Judge who tries the case may, in his discretion, submit one or many, provided that neither party is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon.

6. It is not error, even when contributory negligence is pleaded, since the enactment of chapter 33, Laws of 1887, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury.

7. When contributory negligence is pleaded, the jury can ordinarily be made to comprehend the law more clearly if not only the issues involving the question of negligence of plaintiff and defendant, respectively, are submitted; but another involving the question, where it is raised by the evidence or the discussion, whether, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care, have avoided the injury.

8. When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass over, injures him.

9. Where one is not a trespasser in using the track as a footway, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains.

10. Where the servant, who is running an engine, sees another standing on the track in front of him whom he does not know at all, or who is known by him to have ordinary intelligence and full possession of all of his senses, the former is not required to stop his engine, but may assume that the latter will step off the track.

11. Where the plaintiff, being in full possession of his senses, stood upon the track in a town till the defendant's engine ran against and injured him, and did not, according to his own evidence, know of its approach till he was knocked off the track, the jury properly found that he was negligent, and would not have been warranted in finding that the defendant, by the use of ordinary care, could have avoided the injury.

This was a CIVIL ACTION, tried at the February Term, 1889, of the Superior Court of GUILFORD County, before *Bynum, J.*

The second paragraph of the complaint was as follows: "That on the said 17th day of February, 1886, the plaintiff, coming from his usual place of business was walking upon track of the defendant's North Carolina Division, as he has been in the habit of doing for several years without objection from the defendant, within the corporate limits of the city of Greensboro, where, owing to the gross negligence of the defendant's servant, he was struck from behind by a locomotive engine belonging to the defendant and operated by its agent, and was violently thrown from the track; that he was, thereby, much injured and suffered great physical and mental pain by having his leg badly strained and bruised, whereby he was temporarily disabled from carrying on his former business as a watchman and laborer, and still suffers great pain and inconvenience." This was denied by defendant.

The issues submitted, with the responses of the jury, were as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged? Ans. Yes.

2. Did the plaintiff contribute to his injury by his own negligence? Ans. Yes.

3. What damage is the plaintiff entitled to recover? No answer.

The words "as alleged," in the first issue, were inserted by the Court on motion of the defendant.

Plaintiff testified that on Wednesday of February Court, 1886, he was watchman at Seargeant's Foundry, and was coming up the track of the railroad about eight o'clock A. M. when he was struck from behind by an engine and knocked off the track. He was struck on calf of legs, skin slightly broken, sole of shoe torn off and ankle and back strained; was unable to work for five or six days; his ankle hurt him for nearly a year, but does not feel it now; back sometimes troubled him before the accident but has been worse since; lost five or six days at one dollar per day and spent one dollar for medicine. The morning was clear; he was in good health and walking four or five miles an hour; had been using the track as a pass-way for eleven years without objection from any one; it was so used by large numbers of people. The engine had no cars attached and passed him about as far as half way across court-room (about twenty feet). He did not hear either bell or whistle; was watching the Salem train, which was switching near him; foundry is about a quarter of mile from depot; witness had walked about half way when struck; had passed the engine with freight train on side track after leaving foundry; engine came off side track on main line and struck him from behind.

Cross-examined.—He was as well as usual that morning—sober, eye-sight good, hearing good; had no disability and could have gotten off the road; stopped a minute to talk with his daughter and another woman on track, but did not step off; they were coming from depot. He did not turn around and did not see or hear the engine; if train was on the track he could have seen it; walked the track half way from foundry to depot; Salem train was on side-track; was looking at it, but had no business with it; engine was on side-track, when it struck him, east of Davie street; N. C. R. R.

track and C. F. & Y. V. track are ten or twelve feet apart; did not hear the bell ringing, but did not swear the bell was not ringing. Murphy was engineer. Sprinkle was first man to come to him; does not think he walked between the tracks, but on main track, because it is a better walk; had no idea engine was behind him.

Sprinkle, a witness for plaintiff, testified he was helping to shift Salem train; heard some one cry out; turned round and saw plaintiff lying on the ground two or three feet from track; was within twenty feet of where plaintiff was struck; saw engine coming and it ran on to the main line; think it was running four or five miles an hour. At that time Salem train was shifting; heard engine that struck plaintiff coming; don't recollect whether bell was ringing; have been on railroad eight years; engine passed plaintiff ten or twelve feet; saw it come to cross-over track, thence back to main track, and up main track towards the turn-table.

Plaintiff then introduced city ordinances. It was admitted that ordinance forbade trains running over four miles an hour within certain limits, and that plaintiff was struck by an engine within those limits, and that plaintiff was not a trespasser.

Testimony for Defence.—Murphy testified he was an engineer on Richmond & Danville road and was, when plaintiff was injured, running the engine which hurt him; came in on North Carolina Railroad track and ran on foundry track; left train on foundry track and backed the engine on cross-over track to main line, and down main line to switch leading to turn-table; first saw plaintiff when pulling on foundry track; he was on main line; next time witness saw him he was walking on Cape Fear track, and the next time eight or ten feet in rear of tender on said track; did not see him on the track before he was struck; witness' seat is on right side of engine; Wiley Holt was on left side; a man on left side of track cannot be seen by engineer in less than ten to thirteen yards; Holt was ringing the bell, sitting in fireman's seat, and told witness, "You have knocked a man off"; this was the first that witness knew of plaintiff being there; witness looked back, went eight or ten feet and stopped, reversing the engine; was using no steam at the time; have been an engineer thirty years. (It was admitted that witness was an expert.)

Defendant's counsel asked witness, "If engine had been rolling down the track over four miles an hour, could you not have stopped in the time you did actually stop?"

Question objected to upon the ground that the negligence of the witness was the alleged cause of the accident, and the character of the question was calculated to indicate the answer desired. (Objection overruled and exception noted.) The witness answered, "No. If it had been going over that speed it could not have been stopped in that distance."

Witness stated that at the time plaintiff was struck the engine was not running over four miles an hour.

Cross-examination.—If going five miles an hour, could stop in fifteen or twenty yards; witness stopped in ten yards; ran about length of engine and tender; did not, and could not, see plaintiff, who was on the left side; when witness first saw him he was walking four or five miles an hour; did not see him when he stopped on North Carolina track; if witness had been notified in time, engine could have been stopped before striking plaintiff, who crossed foundry track and got on main line ahead of engine.

Wiley Holt, for defendant, testified that he was sitting on south side of engine when plaintiff was struck; as engine came on main line plaintiff was standing "facing us," talking to two women who had their backs to us; engine started on main line for depot; plaintiff was walking between main line and Cape Fear track just before he was struck; he started across main line in front of engine and was struck and knocked off; witness was ringing the bell at the time.

Cross-examination.—Witness did not tell plaintiff he saw him on the track and thought he was going to step off; plaintiff is unfriendly to witness and does not speak to him; plaintiff stepped on track about ten or twelve feet as if he was going to cross; did not notify engineer; plaintiff could have jumped across before engine got to him.

Murphy was re examined by defendant, and stated that the character of Holt was good, except as to fighting. There was other evidence to the same effect.

The plaintiff was re-examined, and stated that he had a conversation with Holt just after the accident, and he said, "I saw you on track and thought you stepped off; Murphy did not see you." Plaintiff states he never got off main track until he was knocked off, and does not think the engineer saw him. Defendant introduced a plat of tracks alluded to and requested the Court to charge—

1. Walking upon the track by a trespasser does not *per se* constitute such contributory negligence as will bar a recovery for injuries sustained from the negligence of the servants of a railroad, and such trespasser may recover if he did nothing else to contribute to the injury. Refused.

2. Acts to constitute contributory negligence must be the proximate, and not the remote, cause of the injury, and such acts as directly produce or concurred in, directly producing the injury. Given.

3. It is required by a railroad company to exercise more care than otherwise necessary in running its trains in a populous town. Refused.

4. Where the public, for a long series of years, has been in the habit of using a portion of the track for a crossing or pass-way, the acquiescence of the company will amount to a license and impose on it the duty of reasonable care in the

operation of its trains, so as to protect persons using the license from injury. Refused.

5. Although the person upon whom the injuries were inflicted contributed thereto by his negligence, if the defendant might have avoided them by ordinary care, and did not, damages may be recovered. Refused.

The Court further charged: As to the first issue, if the accident was caused by negligence of defendant, the jury should answer Yes; otherwise, No. The burden is on the plaintiff to show negligence. If the engine was moving four miles an hour, defendant not being at a crossing, it was not negligence not to ring the bell, unless the failure to ring the bell is shown to have contributed to the injury. If you find, from the evidence, that the engineer failed to ring the bell, that did not relieve the plaintiff from the necessity of taking ordinary precaution for his safety. Negligence of defendant in that particular was no excuse for plaintiff's negligence; he was bound to look and listen to avoid an approaching train while walking on the track. If he could have seen or heard the engine approaching, and he omitted to do so, and carelessly and thoughtlessly walked on the track, he was guilty of negligence and contributed to his injury, and the consequences cannot be cast upon the defendant. If the company had, by long consent, allowed the public to pass and repass on the track where plaintiff was struck, then plaintiff was not a trespasser, but in the use of it the plaintiff must use precautions that a man of ordinary understanding, and in the possession of the ordinary senses of men, would use to avoid injury to himself by passing trains. The company has a right to the unobstructed use of its track for the purpose of running its trains.

At request of defendant, the Court further charged that if the engineer did not see or, by reasonable diligence, could not have seen the plaintiff on the track, there was no negligence on his part; that it is the duty of every person on the track to get off when an engine is approaching, and not to do so is negligence; and this, whether there was an ordinance forbidding an engine from moving more than four miles an hour or not. The plaintiff had no right to put himself in the way and rely on the ordinance to save him. If he saw the engine approaching, it was negligence to remain in the way, whether the bell was ringing or not

Plaintiff excepted to the refusal of the Court to charge as requested. Plaintiff moved for judgment *non obstante veredicto*, and for an inquiry as to damages, on the ground that contributory negligence was not a ground for defence against gross negligence, as found by the jury, the plaintiff having alleged gross negligence in his complaint. The motion was overruled and the plaintiff appealed.

Mr. R. M. Douglas, for the plaintiff.
Mr. D. Schenck, for the defendant.

AVERY, J.—after stating the facts: The first assignment of error rests upon the refusal of the Court below to render judgment in favor of the plaintiff upon the verdict. The plaintiff declared in his complaint that he was walking upon the track of the defendant company in returning from his place of business, "as he had been in the habit of doing for several years, without objection from the defendant, within the corporate limits of the town of Greensboro, when, owing to gross negligence of the defendant's servants, he was struck from behind by a locomotive engine, belonging to the defendant, &c., and thrown from the track, and was, thereby, much injured," &c. To the issue, "Was the plaintiff injured by the negligence of the defendant, as alleged?" the jury responded "Yes," while they found, in answer to the second issue, that the plaintiff, by his own negligence, contributed to cause the injury.

The most learned and discriminating text-writers concur in the opinion that in actions arising *ex delicto* there is no degree of negligence that can be described by the word "gross," alone. But where an injury is due, and can be traced directly to the wilful act of another, he is not absolved from liability by the concurrent negligence of the injured party, as he is not, where, by the exercise of ordinary care, he could, notwithstanding the fault of the injured party, have saved the latter harmless. Shearman & Redfield on Negligence, §§36 and 37; Cooley on Torts, p. 674. Hence, we often find, in opinions emanating from this and other Courts, the expression "gross and wanton negligence;" but the former word is never used to describe a degree of carelessness that will excuse the fault of a plaintiff in exposing himself to danger, except where it is improperly held synonymous with either the word wilful, malicious or fraudulent. Shearman & Redfield on Negligence, §3; *Wilds* v. *Hudson R. R. Co.*, 24 N. Y., 430; *Cattawissa Railroad Co.* v. *Armstrong*, 49 Penn. St., 186; *Neal* v. *Gillett*, 23 Conn., 437; *Cunningham* v. *Lyness* 22 Wis. 245; *Sandford* v. *Eighth Avenue R. R. Co.*, 23 N. Y., 343. Wharton (in his work on Negligence, §64) maintains that, outside of the rule applicable to common carriers (which makes them, according to the circumstances, either insurers or bound to show the care of a prudent man in the conduct of his own business, or liable for gross negligence), there are no recognized degrees of negligence, or negligence that can be described by the words "slight" or "gross." *Culbreth* v. *Philadelphia*, &c., *R. R. Co.*, 3 Houston, 392; Wharton on Negligence, §500. In *Steamboat "New World"* v. *King*, 16 Howard, 474, Justice CURTIS, for the Court, goes much further when he says, speaking of actions arising out of contract, as well as tort: "If the law furnishes no definition of the terms gross negligence or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

If the plaintiff had alleged that the defendant company, or its servants, had wilfully, wantonly, purposely or maliciously run an engine against and injured him, a very different question would have been presented. In *Manly* v. *The W. & W. R. R. Co.*, 74 N. C., 655, this Court said: "When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in default, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself. That case was subsequently cited with approval as to the first point in *Rigler* v. *The Railroad Co.*, 94 N. C., 610, and in *Walker* v. *Town of Reidsville*, 96 N. C., 382. See also *The Evansville, &c., Railroad Co.* v. *Lowdermilk*, 15 Ind., 120; *The Lafayette, &c., Railroad Co.* v. *Adams*, 26 Ind., 76; 2 Woods' R. L., 319.

We think, therefore, that as the plaintiff did not declare that the engineer or fireman inflicted the injury wilfully, wantonly, or through malice, the word "gross" must be treated as a mere expletive, and the use of it, as characterizing the negligence alleged, makes no material difference in the meaning of the complaint; and the finding that the plaintiff was injured, "as alleged," must be treated as an affirmative response to an issue involving only the question, whether the defendant failed to exercise ordinary care in the management of the engine, and thereby injured the plaintiff.

As the jury found, in answering the second issue, that the plaintiff, by his concurrent negligence, contributed to cause the injury, the judgment rendered must stand, unless there was error in misdirecting the jury. *Manly* v. *Railroad*,

supra; Smith v. *Railroad*, 99 N. C., 241; *Troy* v. *Railroad*, 99 N. C., 298; *Chambers* v. *Railroad*, 91 N. C., 471; *Turrentine* v. *Railroad*, 92 N. C., 638; *Rigler* v. *Railroad*, *supra.*

In reference to framing issues for the consideration of the jury, this Court has, by repeated adjudications, determined—

1. That only issues of fact raised by the pleadings must be submitted to the jury. *Wright* v. *Cain*, 93 N. C., 296; *Carpenter* v. *Tucker*, 98 N. C., 316; *Emry* v. *Railroad*, 102 N. C., 209.

2. The verdict, whether upon one or many issues, must establish facts sufficient to enable the Court to proceed to judgment. *Emry* v. *Railroad*, *supra.*

3. Of the issues raised by the pleadings, the Judge who tries the case may, in his discretion, submit one or many, provided that neither party is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon. *Emry* v. *Railroad*, *supra; Meredith* v. *Coal & Iron Co.*, 99 N. C., 576; *McDonald* v. *Carson*, 94 N. C., 497. In accordance with these rules, this Court has held that in trying a case like that before us, where contributory negligence is pleaded as a defence, it is not error to confine the jury to the single issue whether the injury was caused by the negligence of the defendant, if the Judge, in his charge, explains the evidence relied on tending to establish contributory carelessness on the part of the plaintiff, and instructs the jury to respond in the negative, if they believe that the plaintiff, according to the law as given by the Court, contributed to cause the injury. *Scott* v. *Railroad*, 96 N. C., 428 On the other hand, it was held to be error in the trial Judge to refuse to submit an issue involving the plaintiff's want of care, and afterwards omit such instruction. *Kirk* v. *Railroad*, 97 N. C., 82.

In the present case it would not have been erroneous to confine the jury to the single issue first considered by them, instead of framing two, as we do not think that chapter 33, Laws of 1887, can be construed to make a new issue necessary, because a specific averment was required to make a defence available. This defence, like that of estoppel, may be covered by instruction and considered as bearing on a more comprehensive issue, such as one involving title. *Meredith* v. *Coal & Iron Co.*, 99 N. C., 576; *Railroad Co.* v. *McCaskill*, 94 N. C., 746 But the jury could doubtless have been made to understand the testimony and the law applicable to it much more clearly, and the labor of the Judge would have been made lighter in this, as it would in many other such cases, if the jury had been allowed to pass separately, not only upon the question of plaintiff's, as well as the defendant's, negligence, but also upon a third question raised by the pleadings discussed by counsel on appeal and suggested by the instructions asked for, whether, notwithstanding the plaintiff's carelessness, the defendant, by the exercise of ordinary care, could have prevented the injury.

It was admitted on the trial that the plaintiff was not a trespasser, and the Judge subsequently told the jury that he was not. In the fourth paragraph of the instructions given, as in the entire charge, the Court proceeded upon the assumption that the defendant must exercise ordinary care. It was not erroneous to substitute said paragraph for the first instruction asked, nor to refuse to give that numbered four, offered by plaintiff.

If it was error to refuse to tell the jury that a railroad company is required to exercise more than the usual amount of care because of the greater peril to persons passing, in running its trains in populous towns, it was cured by the response to the first issue, and for the same reason it is now unnecessary to decide whether the law was correctly stated in the instructions numbered one and six, given by the Court.

When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass across the road, injures him. *Bullock* v. *Railroad*, decided at this term; 2 Wood's R. L., § 333. Even where it is conceded that one is not a trespasser, as in our case, in using the track as a footway from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the use of all of his senses will step off the track before a train reaches him. Wharton on Negligence, § 389*a*; *Parker* v. *Railroad*, 86 N. C., 221; 2 Wood's R. L., § 320.

The plaintiff was known to the fireman, and, presumably known to have ordinary intelligence and to be able to hear an approaching train. The plaintiff could not recover if the engineer and fireman, without any actual knowledge of, or acquaintance with him, had acted as they did on the assumption that he would get out of the way. There was no error, therefore, in giving the instructions numbered 3, 5, 7, 8 or 9.

The plaintiff "would not swear" that the bell was not rung, while the engineer and fireman both testified that it was rung. There was no error, however, in the instruction predicated upon the supposition that they failed to ring it. According to the plaintiff's own testimony, he stood upon the track, with his back towards the engine, and did not see it till after he was stricken by it. He was, therefore, in any aspect of the case, negligent, and the jury would not have been warranted in finding that the defendant could have prevented the injury by using ordinary care, because it was not even negligence unless it grew out of violating a town ordinance, when it was apparent that the plaintiff was awake and in full possession of all his senses, to run the engine at the rate of five miles an hour. If it was running at five miles an hour (and the only testimony is that it was running four or five), it is manifest that a reduction of the speed to one mile less an hour would not have prevented the injury by enabling the plaintiff to see with his face turned in the opposite direction. But all this might possibly have been more clearly presented if there had been a third issue, and his Honor had said there was no testimony to support an affirmative finding on it. There is no error, and the judgment is affirmed.

Affirmed.

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*ELIZABETH BERRY v. THOMAS J. HALL.

Evidence—Depositions—Fraud—Inadequacy of Price—Mental Capacity—Undue Influence—Judge's Charge—Trial by Jury.

1. Testimony that a person is sane or insane at the time of trial is competent as tending to show the condition of his mind at a previous period, when some act was done by him, the character or validity of which depended upon his mental capacity, and such evidence does not become incompetent by the mere lapse of time, but the evidence must be left to the jury to judge of its weight.
2. A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the Clerk prescribed by *The Code*, § 1357, or show facts that would amount to a waiver by the opposite party of the statutory requirement.

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* Head-notes by Avery, J.

3. Even where one purchases the land of an insolvent debtor, and a controversy ensues between the *creditors* of *the vendor* and *the vendee* as to the character and validity of the conveyance, the fact that an inadequate price was paid is but a circumstance tending to show fraud, or a badge of fraud, that throws suspicion upon the transaction and calls for close scrutiny.

4. When *a grantor* seeks to set aside an executed conveyance on this ground, proof of even gross inadequacy of price, standing alone as a circumstance, in the absence of evidence of actual fraud or undue influence, is insufficient to warrant a decree declaring the conveyance void.

5. Where, in addition to the admitted disparity between the price paid and the real value, there is conflicting evidence as to the mental capacity of the grantor, or her subjection to or freedom from some fraudulent and controlling influence, the inadequacy of price is a circumstance to be considered by the jury with all other testimony tending to show fraud, undue influence or want of capacity.

6. If there be evidence tending to establish any fact that, if proven or admitted, would raise the presumption that the transaction was fraudulent, as alleged, the trial Judge may, of his own motion, and must, if requested in apt time, or if it be essential to a proper understanding of the application of the law to the testimony, instruct the jury as to its weight; but he is not at liberty to say to the jury that any fact, proved or admitted, that does not, in law, raise a presumption of the truth of the allegation of fraud, is a *strong circumstance tending to establish it.*

7. What effect is to be given to testimony competent in law to establish a fact must be left to the jury, but opinions of chancellors, when performing the functions of a jury, as well as a Judge, upon particular states of fact, must not be mistaken for rules of evidence and applied where the facts in evidence before a jury are analogous. This cannot be done without invading the province of the jury.

8. The rules as to the *quantum* and quality of proof required in certain classes of cases laid down in *Harding* v. *Long*, 103 N. C., 1; *Brown* v. *Mitchell*, 102 N. C., 347, and *Ely* v. *Early*, 94 N. C., 1, will be adhered to without modification.

This was a CIVIL ACTION, tried at the March Term, 1889, of the Superior Court of ORANGE County, before *Bynum, J.*

The plaintiff is the widow of Thomas P. Berry, and after his death a tract of land containing one hundred and six acres was allotted to her as dower out of the lands formerly belonging to him. The defendant bought other adjacent lands and the reversionary interest in the tract allotted to her. Afterwards, in pursuance of an agreement with the defendant, she conveyed to him her dower interest, and in exchange he conveyed to her fifteen acres of land adjoining, on which was a cabin, but only three acres of cleared land. He gave her twenty-five dollars in addition to the last-named tract of land for her dower.

Subsequently she brought this action, alleging that by fraud and undue influence the defendant had induced her to make an unconscionable trade, setting forth in detail the nature of the influence and the great inequality in the value and rental value of the two tracts of land exchanged. After the action was brought, on the 21st of August, 1886, an inquisition of lunacy was held, and the jury first summoned, returned as their verdict that she "may not be an idiot." This verdict was set aside by the Clerk and another jury was empaneled, who found that "said Elizabeth Berry is *non compos mentis* and incapable of attending to her affairs." The record of the Special Proceeding showing these facts was first put in evidence.

Both plaintiff and defendant offered evidence tending to show the value, and rental value, both of the dower tract of land and the fifteen acres conveyed in exchange for it. The witness estimated the dower to be worth from $700 to $1,000; the fifteen-acre tract, from $100 to $200; the annual rental value of the former to be from $20 to $50, and that of the latter, $15.

A great deal of testimony was offered for the plaintiff tending to show that she was of weak mind and acted under undue influence, and testimony especially as to the circumstances attending the trade.

The defendant, on the other hand, offered testimony tending to show that he agreed to make the trade after repeated solicitations from the *feme* plaintiff, who declared that she would not live in the dwelling-house on the land assigned her as her dower, and expressed a desire to live on the place conveyed to her. The defendant offered evidence to show that he furnished her wood and cut it up for her, and aided her otherwise. Defendant also offered testimony tending to show that the plaintiff was of sound mind and understoood what she was doing when she executed the deed that she seeks now to have cancelled; and especially that of the Justice of the Peace who wrote the deed of exchange.

Defendant finally offered *feme* plaintiff as a witness, who testified as follows: "I was a Peed; first married Boles, then Berry; Berry died; dower was laid off to me; balance of land sold; John Robin Berry bought it; Hall got it; don't know who laid off my dower; piazza of house was about to fall; nothing else wrong, so far as I know, except stables; they were not very good; Berry was seventy-four or seventy-five years old; land lay idle the year he died; Billy Gates worked it the next two years; don't know how many acres in cultivation; think John Robin Berry wound up the estate; think I left there latter part of winter and came back; McKee boys bargained for land; didn't run out enough and they backed out; Hall and myself exchanged land; he paid me $25; I got scared there; didn't know whether I could stay there or not; got most crazy at times; I named something about selling my part; thought I might be better satisfied on the other end of the plantation; don't remember sending word to Hall by anybody; I somewhat agreed to it; did not have my mind about it; Simpson went to see Hall; Hall came; Simpson told it over to Hall; Hall asked me if I considered it a bargain; I said I reckon so; Hall might have come next day; Jordan came with him day papers were written; I remember my brother Joel was there; Gates was passing about; don't know who else was there; Jordan did the writing; don't know what I said to Jordan; don't remember saying anything to him; don't know whether the papers were read or not; no money was paid me that day that I know of; I stayed on there a long time; they ordered me to get out and I told them I would not; Hall said it was moving time; I did go over to the other house; I don't remember what Hall said; don't remember whether Simpson was there or not; I got troubled and pestered about a heap of things, and didn't know what to do for the best; I was dissatisfied; Hall made a proposition; I didn't know what he said."

Cross-examined, said: "Riley and Simpson came together; only came one time; Simpson told Hall, in my presence, what was said; I never said a word; I had two beds; had to let them go for something to eat; don't know why I made the trade, unless it was for the want of good sense; Hall held my money; he told me he could handle the money better than I could, and was more capable of trading than I; I reckon I signed the paper when Jordan was there, but don't know what it was."

Defendant then introduced Dr. A. C. Jordan, who was admitted to be an expert, and proposed to ask the following question: "From your knowledge and experience as a physician, after seeing the conduct of the plaintiff on the stand, and hearing her testimony, what, in your opinion, is the condition of plaintiff's mind at this time?" Plaintiff's counsel objected, upon the ground that the condition of her mind at this time has nothing to do with what it was at the time the trade was made Objection overruled, and exception. Witness answered: "In my opinion it is good, for an illiterate woman like Mrs. Berry."

John Terrell, a witness for defendant, testified that he was on the second jury; that plaintiff's mind is better than it was then.

Charles Miller testified for defendant: "Was on the first jury of inquest; mind of plaintiff good for a woman of her age."

Plaintiff then introduced Mrs. Gates, who testified: "Plaintiff can be persuaded to do anything; don't think she has judgment enough to comprehend a trade like this; the land she sold had enough cleared land for her to make a living on."

Other witnesses testified that the land plaintiff sold was worth $800, and the land she got $200; that her mind was weak. One of them said nobody but a fool would make such a contract as she did.

After the inquisition of lunacy, a guardian was appointed for Elizabeth Berry, and he was made a party plaintiff and filed a complaint.

The plaintiff offered the last verdict in the special proceeding, and the defendant the first, which the Clerk set aside.

Plaintiff offered to read the deposition of three witnesses. The defendant's counsel objected on the ground that notice of one day had not been given, as required by section 1357 of *The Code*, and that the deposition had not been passed upon by the Clerk. The objection was sustained. The deposition was not allowed to be read, and plaintiff excepted.

Of the instructions asked by the plaintiff, the Court gave the following:

"1. That gross inadequacy of price is a strong circumstance tending, with others, as weakness of mind, to make out a case of fraud.

"6. That if the jury shall believe that plaintiff did not have capacity to understand the nature of the contract she entered into for the exchange of land with defendant, then the jury should answer the second issue, No."

The Court refused to give the following instructions submitted by plaintiff:

"2. That when the inadequacy of consideration is so gross as to cause any fair-minded man to exclaim, 'Why, this inadequacy is so great that none but a fool would make such a contract, and no honest man would take advantage of it!'

"3. That an unconscientious bargain, such as demands the interposition of a Court of Equity, is one where the inadequacy of price is so great as to cause a fair minded man to exclaim, 'Why, none but a fool would make this contract, and no honest man would take advantage of it!'

"4. That if the jury shall find that plaintiff's mind was so weak that she was unable to guard herself against the imposition, or to resist the importunity of defendant, and she was imposed upon in consequence of this, then they should find that the deed from plaintiff to defendant was obtained by fraud, and that the great inadequacy of price may be considered as a strong circumstance in connection with this upon the question of fraud, and the jury should answer the first issue, Yes.

"5. If the jury shall find that the value of the home place, or dower tract, was $800 or $1,000, and the fifteen-acre tract $150 or $200, then the inadequacy of price is so great as to amount to apparent fraud; and if they shall further find that the situation of plaintiff and defendant is so unequal as to give defendant an opportunity of making his own terms, then they should find that the deed was procured by fraud, and should answer the first issue, Yes.

"7. That if the jury shall find that the price paid for her dower was out of all proportion to its real value, and that plaintiff was of weak mind, then this weakness and inadequacy, taken together, should be sufficient to constitute fraud, and they should answer the first issue, Yes."

The Court charged the jury further as follows:

"The burden is upon the plaintiff to prove to the satisfaction of the jury that the exchange of the land was obtained from her by fraud, on the part of defendant. Mere inadequacy of price is no ground for setting aside a contract, unless it be such as amounts to apparent fraud, or the situation of the parties be so unequal as to give one of them an opportunity of making his own terms. As to whether the inadequacy of price paid by defendant (if you find from the evidence it was inadequate) is a fraud, is a question for you, taking it into consideration with the other circumstances; and if you find it was so grossly inadequate as to shock the conscience of an honest man, it would be apparent fraud. Weakness of mind alone is not a sufficient reason for annulling the exchange of land on the ground of fraud, but it may be considered by the jury, with the other circumstances in this case, in arriving at their conclusion on the question of fraud on the part of defendant. If they shall find that plaintiff's mind was so weak that she was unable to guard herself against imposition, or to resist the importunities of defendant, and she was imposed upon in consequence of this, then they should answer the first issue Yes; and if they find from the evidence great inadequacy of price paid by defendant, they can consider that as a circumstance, with the other circumstances in this case, in arriving at a conclusion on the question of fraud. A party to a contract cannot have it annulled when the means of information are alike open to each party, and there is capacity on the part of each to understand what is done. If the party signing the deed knows what she is doing and to whom the deed is made, and what is conveyed and what is received in exchange, her mental capacity is sufficient to enable her to make a deed. The law does not require that a person should be able to dispose of property with judgment and discretion; it is sufficient if he understand what he is about; and it is proper for the jury, in this connection, to consider the condition of plaintiff's mind, as they shall find it to be from the evidence in this case, the circumstances of plaintiff and defendant, and the value, as they shall find from the evidence, of the two tracts of land. If they find that plaintiff, at the time of executing the deed, had sufficient capacity to understand the nature and value of property disposed of, and what she was receiving therefor, and she freely signed it, she was capable of making the deed. The right to dispose of property at the will of the owner belongs to every one of sufficient capacity, and the jury must not annull the contract because they may think it imprudent, or such as a wise person would not make, or a man of nice honor consent to receive; and all bargains formally executed are binding, unless they are obtained by fraud, the suggestion of a falsehood, or the suppression of truth. But the jury may consider the inadequacy of price paid by defendant, if they find the price paid by him was inadequate on the question of fraud."

Plaintiff's counsel excepted to the refusal of the Court to charge as requested, and also for admitting improper testimony which was objected to. Motion for new trial overruled, and the plaintiff appealed from the judgment rendered.

Mr. John Manning, for plaintiff.

Messrs. J. W. Graham, *A. W. Graham* and *Robert W. Winston*, for defendant.

AVERY, J.—after stating the facts: The objection to the competency of the physician's testimony as to the sanity of the *feme* plaintiff, after he had observed her demeanor as a witness, is clearly not tenable. It is a well settled rule that evidence that a person is sane or insane at the time of trial is competent as tending to show the condition of his mind at a previous period, when some act was done by him, the character or validity of which depended upon his mental capacity; and though months or years may intervene, such evidence does not become incompetent by the mere lapse of time, but the jury must be left to judge of its weight. 2 Greenleaf on Ev., §690; *People* v. *Farwell*, 31 Cal., 576; *Freeman* v. *People*, 4 Denio, 9.

The plaintiff offered the depositions of three persons, when the defendant objected, on the ground that he had not received notice of one day of the opening of the depositions by the Clerk, as required by *The Code*, §1357, and that the Clerk had not passed upon them. It is the fault of the plaintiff if a fuller finding of the facts would have shown a waiver of the statutory requirement by the defendant. The law makes it the duty of the Clerk to open the depositions sent to him by the commissioner in a sealed envelope, and to pass upon them, "after having first given the parties, or their attorneys, not less than one day's notice." The plaintiff should have demanded that this notice be given and acted on, and then the deposition would have been deemed, in the language of the law, "legal evidence."

Even when one purchases the land of an insolvent debtor, and a controversy ensues between the *creditors* of the *vendor* and the vendee as to the character and validity of the conveyance, the fact that an inadequate price was paid is but a circumstance tending to show fraud, and, at most, is to be considered a badge of fraud, that throws suspicion on the transaction and calls for close scrutiny. Bump. on Fraud. Conv. 76, 77 and 87; *Brown* v. *Mitchell*, 102 N. C., 369. When the grantor seeks to set aside an executed conveyance on this ground, proof of even gross inadequacy of price, standing alone as a circumstance, in the absence of evidence of actual fraud or undue influence, is insufficient to warrant a decree declaring the conveyance void. Bigelow on Fraud, p. 136, §9; Kerr on Fraud and Mistake, 189; *Guster* v. *Thomas*, 1 Ired. Eq., 199; *Potter* v. *Everett*, 7 Ired. Eq., 152; *Green* v. *Thompson*, 2 Ired. Eq., 365; *Moore* v. *Reed*, 2 Ired. Eq., 580. "Inadequacy of price is not a distinct principle of relief in equity, but it depends upon the attendant circumstances which show fraud." *Potter* v. *Everett*, *supra;* Story's Eq., §249. Where it appears that certain confidential relations existed between the parties that need not be here enumerated, there is a presumption that the deed is fraudulent, and the burden is cast upon the grantee of rebutting it. But where, in addition to the admitted disparity between the price paid and the real value, there is conflicting evidence as to the mental capacity of the grantor or her subjection to, or freedom from, some fraudulent and controlling influence, the inadequacy of price is a circumstance to be considered by the jury, with all other testimony tending to show fraud, undue influence, or want of capacity.

If there be evidence tending to show any fact that, if proved or admitted, would raise the presumption that the transaction was fraudulent, as alleged, the trial Judge may, of his own motion, and must, if requested in apt time, or if it be essential to a proper understanding of the application of the law to the testimony, instruct the jury as to its weight; but he is not at liberty to say to the jury that any fact, proved or admitted, that does not, in law, raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. *Ferrall* v. *Broadway*, 95 N. C., 551.

In the case at bar, as in many others that have come before this Court for review, several propositions submitted in the prayer for instructions are extracts from opinions delivered by the Court in chancery causes, and embody expressions as to the weight of the testimony in that particular suit in which the Judge, as Chancellor, discharged the functions now belonging, peculiarly, to the jury, as well as the duties proper of a Court, and often necessarily discussed the law and the weight of the evidence in the same connection. The reasons assigned in these opinions for giving more or less weight to any testimony were not intended to be, and cannot, without invading the province of the jury by violating *The Code*, § 413, be adopted as rules to be laid down in the charge of the Court for their guidance. In the case of *Ferrall* v. *Broadway*, *supra*, the Judge below adopted the exact language of this Court in *Jackson* v. *Rhem*, 6 Jones' Eq., 141, in telling the jury that certain testimony offered in that cause to show that two persons, then dead, were lawfully married, "*ought to be so overwhelming as not to leave a doubt about the facts thus declared.*" After stating that the instruction was erroneous, the late Chief Justice SMITH, delivering the opinion of this Court, said: "What effect is to be given to testimony competent in law to establish a fact belongs exclusively to the jury to determine, as also the credibility of the witnesses who give the testimony. This is so universally recognized and acted on in the administration of the law, in tribunals constituted of a Judge and jury, and exercising their separate functions, as to need no support from references. The error committed in the charge is in imposing upon a jury the rule which a Judge, passing upon facts without a jury, prescribed for his own action as one which the jury is bound to obey." *State* v. *Williams*, 2 Jones, 257; *Wiseman* v. *Cornish*, 8 Jones, 218; *Flynt* v. *Bodenhamer*, 80 N. C., 205; *State* v. *Atkinson*, 93 N. C., 519.

We do not wish to be understood as modifying or relaxing the rule reiterated in *Harding* v. *Long*, 103 N. C., 1, and in *Brown* v. *Mitchell*, 102 N. C., 347, as to the quantum and quality of proof required in certain classes of cases, as where equitable relief is asked on the ground of mistake in the execution of a deed, or the action is brought to establish a resulting trust, because it is supported by a long line of adjudicated cases in our own reports and other recognized authority, and is founded upon reason and public policy. *Sandlin* v. *Ward*, 94 N. C., 490; *Ely* v. *Early*, 94 N. C., 1; *Kornegay* v. *Everett*, 99 N. C., 30. But opinions of Chancellors as to the weight of evidence in particular cases, when they are often inconsistent with ideas of the testimony, expressed by the same Court or the same Judge upon a state of facts almost identical in some other suit, must not be mistaken for rules of evidence. Where the facts tending to establish the right of a plaintiff to the equitable relief demanded *are in dispute*, the jury must pass upon the testimony, and the Judge has no right to express an opinion as to its weight, but may, and under certain circumstances must, explain the law as to presumptions arising on the evidence, or the rule as to the quantum of proof laid down in the cases last mentioned.

Without a discussion in detail of the numerous propositions submitted by the Judge below to the jury with the purpose of presenting the law applicable to every phase of the testimony, we may state, as our conclusion arising out of the principles already announced, that there is no error in his Honor's instructions of which the plaintiff can justly complain, and the verdict of the jury has made objections on the part of the defendant unnecessary. The plaintiff might well have been content with the rule laid down by the Court, that gross inadequacy of price is a *strong circumstance* tending with others, as weakness of mind, to make out a case of fraud; but the Court, at the plaintiff's request, submitted other propositions of law, perhaps still more favorable to her.

The Constitution gives the parties the right to trial by jury. The statute intrusts to the jury, subject to the rules stated, the exclusive power to pass upon the weight of the testimony, and the Court can only review errors of law. If, upon the admitted facts, it should seem to us that the plaintiff has made a bad bargain in exchanging a life estate in a tract of land worth from $800 to $1,000 for an estate of the same duration in another worth from $150 to $200, we could not for that reason alone question the validity of the transaction. The jury, acting under instructions as to the law, perfectly fair to the plaintiff, have declared in their findings that she had sufficient mental capacity to make a valid deed when she executed the conveyance to the defendant, and they had the advantage of watching the demeanor of all the witnesses, including the plaintiff, on the stand. There is no error, and the judgment must be affirmed.

Affirmed.

**In re* LARKIN SMITH.

Re-taxation of Costs—Motion—Appeal.

1. When a motion to re-tax a bill of costs is made at the next term after judgment is entered, it is error for the Judge to hold that he has no power to entertain it. *Semble*, the motion could be made any time within one year after judgment.
2. Usually, a ruling of the Court upon taxation of witness tickets is not appealable, but it is otherwise when the Court refuses to act on the motion, on the ground of a want of power.

APPEAL from judgment of *Armfield, J.*, at October Term, 1889, Wake Superior Court, refusing a motion to re-tax costs.

This was a proceeding by the daughters, suing as next friends of Larkin Smith, to have him declared incompetent to manage his affairs, begun before C. D. Upchurch, Clerk of the Superior Court of Wake. Two juries having failed to agree upon a verdict, the clerk dismissed the petition and adjudged that the petitioners pay the costs. On appeal from this judgment it was affirmed by *Graves, J.*, at April Term, 1889, of Wake Superior Court. An appeal was taken from him to the Supreme Court, which appeal was dismissed October, 1889, for failure to print the record, as required by the rules of this Court. Thereupon, at October Term of Wake Superior Court, before *Armfield, J.*, the petitioners filed an affidavit to re-tax the bill of costs by striking out the witness tickets of certain witnesses, who, it was alleged, had not been examined in the cause, and to strike out an allowance made to another witness as an expert, who, it was claimed, had testified only as witness to the facts This motion the Judge refused, on the ground that he did not have the power to grant it. Petitioners appealed.

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* Head notes by CLARK, J.

Mr. J. H. Fleming, for petitioners.
Mr. E. C. Smith, *contra.*

CLARK, J.: The dismissal of the former appeal by this Court simply left in force the judgment of the Superior Court made at April Term, 1889. The question presented for our consideration is whether the Judge, at the next term, October, 1889, had the power to re-tax the bill of costs by striking out objectionable items. The judgment at Spring Term that petitioners pay the costs, was, like any similar judgment between adversary parties, conclusive as to the question by whom the costs were to be paid. To that extent it is *res judicata*, and cannot be re-opened. We do not understand such to be the object of this motion, which is not to again contest the question by whom the costs are to be paid, but the correctness of certain items, allowed and taxed in the bill of costs. Had this been an adversary proceeding, the party who had obtained the judgment would not have been necessarily a party to the motion. The controversy is not between the parties to the judgment, but between the party adjudged to pay the costs and witnesses, or others who have claims upon the costs.

It is not unusually the case that the bill of costs is not made out until after the adjournment of the term at which the judgment was rendered. If, therefore, a party aggrieved cannot move, at a subsequent term, to re-tax the costs, it would subject losing parties to payment of any amount of costs, however erroneous, which might be taxed against them. The motion to re-tax is in the nature of an appeal from the action of the Clerk in making out the bill of costs, and in no wise impeaches or calls in question the previous judgment of the Court. Motions to re-tax are not infrequent on the circuit, and have always been recognized as a part of the supervisory authority which the Courts have and ought to exercise over the conduct of the Clerk in taxing the costs. The motion should be made promptly. It would be better if it could always be made at the trial term, as the Judge who tried the cause is better acquainted with the materiality of the witnesses, and can more understandingly exercise the large discretion in regard to costs which is vested in the Judge. *The Code*, § 3760, permits a motion to re-tax costs to be made in favor of any officer within one year after the termination of the action, and section 748 authorizes a similar order in favor of a witness within one year after judgment. Section 274 authorizes the Court, within one year, to relieve any party from an order, &c., taken against him by inadvertence or excusable neglect. There is no statute specifying the time in which the party can move to re-tax a bill of costs which he deems improvidently made out Such motion should be made in reasonable time, and the right to make it has always been unquestioned. Tidd's Prac., 990. It would seem from analogy to above sections that it would be in time if made by the party cast at any time within one year. We are not called upon now, however, to do more than to say that, as to the motion here, which was made at the first term after judgment rendered, there was not unreasonable delay. If there is *laches* in not making the motion at the earliest practicable time, the Judge may consider that in refusing or granting the motion. It does not deprive him of power to act upon it. A party is not presumed to have notice of the items taxed in the bill of costs, as he is of all orders and judgments in the cause itself.

It is true this case originated before the Clerk, but, having got into the Superior Court, the Judge thereof had the power and the jurisdiction to make all proper orders and judgments in the case independent of his general supervisory authority over the costs. Acts 1887, ch. 276.

Had the Judge below, in those cases left to his discretion (*The Code*, §§ 733, 744, 748), allowed or refused to allow the items objected to, his action would have been final and not reviewable. *State* v. *Massey*, 104 N. C., 877. But he puts his refusal upon a want of power to pass upon the motion to re-tax, and that presents a question for review. We think there was

Error.

*G. R. HODGES v. WILMINGTON & WELDON RAILROAD COMPANY.

Pleading—Misjoinder—Action Divided—Statutory Duty.

Plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by the road-bed erected by defendant ponding water back on plaintiff's land; the other to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by *The Code*, § 1975, whereby cattle trespassed upon plaintiff's enclosed lands and crops. On demurrer held an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty, and the action should be divided.

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* Head-note by CLARK, J.

Action, before *Armfield, J.*, determined upon demurrer at November Term, 1889, Harnett Superior Court.

From judgment overruling demurrer, defendant appealed.

Mr. F. P Jones, for the plaintiff.
Mr. T. H. Sutton, for the defendant.

Clark, J.: The complaint alleges that, by reason of the road bed of defendant, erected over plaintiff's land, the water was ponded back—water sobbing his land and damaging his crops; and, secondly, that it was the duty of the defendant to erect good and sufficient cattle-guards at the points of entrance and exit of its track upon plaintiff's enclosed land, and, by reason of failure to comply with such duty, stock had passed into plaintiff's enclosure and damaged his crops; thirdly, that the building of defendant's road-bed and embankment, had turned the natural flow of the water, causing deep gullies to be washed in plaintiff's land. The defendant demurred for misjoinder of causes of action, upon the ground that the alleged breach of the duty imposed by statute of keeping up sufficient cattle-guards was upon an implied contract and could not be joined with the other causes of action, which were for injuries to real property.

A cause of action for tort cannot be joined in the same action with a cause of action upon contract unless they arise out of the same transaction, or transactions connected with the same subject of action. Such is not the case here. The first and third causes of action allege injury to real property by reason of the erection of defendant's embankment and road-bed. This is the transaction which is the subject of the action. The other cause of action has no necessary connection therewith. It existed, whether defendant had erected an embankment or not, and was for failure of defendant to put up cattle-guards at the points where defendant's track passed through plaintiff's enclosure. In the absence of legislation there was no duty imposed upon defendant to put up such cattle-guards. Had this second cause of action arisen from wrongfully piercing plaintiff's line of fence, and thereby turning in cattle, unless fenced out by plaintiff, this would have been a tort. But so far from that, the defendant was authorized by law to enter, and compensation was given plaintiff for such lawful entrance, by proceedings to condemn the right-of-way. The second cause of action was for failure to perform the duty imposed by *The Code*, § 1975. An action for the alleged breach of the implied contract to perform a statutory duty "arises upon contract." A case exactly in point is *Utica & Black River Railroad Company* v. *Thomas*, 20 Am. and Eng. R. R. Cases, 93. There, the complaint was to recover damages caused by railroad embankment ponding back water on adjacent land, and for neglect of the railroad company to erect and maintain a farm-crossing, as required by statute. The Court held that the two causes of action did not arise out of the same transaction, and, inasmuch as the second cause of action was for failure to perform a statutory duty, it "arose upon contract," and there was a misjoinder. In *N. Y. & N. H. Railroad* v. *Schuyler*, 34 N. Y., 85, it is laid down that "all duties imposed upon a corporation by law raise an implied promise of performance." To same effect, *Inhabitants of Booth* v. *Freepoint*, 5 Mass., 326; STORY, J., in *Bullard* v. *Bell*, 1 Mason, 243; *Kortright* v. *Buffalo Bank*, 20 Wend., 94, and *Carrol* v. *Green*, 92 U. S., 513.

We think the demurrer should have been sustained. *The Code*, § 267; *Logan* v. *Wallis*, 76 N. C., 416; *Doughty* v. *Railroad*, 78 N. C., 22. But the plaintiff is entitled below to an order to have the action divided into two, without further service of summons. *The Code*, § 272; *Street* v. *Tuck*, 84 N. C., 605; *Finch* v. *Baskerville*, 85 N. C., 205.

The defendant would have been entitled, in any event, to an order of repleader, because the different causes of action are not stated separately as such, but all together, without any separation or distinction.

Error.

*GEORGE H. MITCHELL v. T. W. HAGGARD.

Settling Case on Appeal—Agreement of Counsel.

1. When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and counter-case *de novo*, and upon disagreement, case on appeal to be settled by the Judge, *nunc pro tunc.*
2. An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of Court, and defendant thirty days thereafter," entitles defendant to thirty days after *service* of appellant's case.

Civil action, tried before *Graves, J*, at Spring Term, 1888, of Bertie Superior Court

Motion by appellant for a *certiorari.* Motion by defendant to dismiss the appeal.

The facts appear in the opinion.

Messrs. R. B. Peebles and *W. D. Pruden*, for the plaintiff.

Mr. D. C. Winston, for the defendant.

Clark, J.: The counsel below in this case signed the following agreement: "It is agreed that plaintiff may have thirty days to file his case on appeal from the adjournment of Court, and the defendant thirty days thereafter, May 5, 1888" The Court adjourned on that day. The appellant served his case on appellee between May the 12th and 15th. The appellee's counsel files an affidavit that he served his counter-case on appellant's counsel on June the 25th, alleges that no application has ever been made to the Judge to settle the case on appeal, and thereupon asks to dismiss the appeal, or rather to affirm the judgment—as was done in

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* Head-notes by Clark, J.

Kirkman v. *Dixon*, 66 N. C., 406—or, at least, to have the appellant's case as amended by his exceptions taken as the case. *Russell* v. *Davis*, 99 N. C., 115.

The affidavit of appellant's counsel controverts this and asserts that no counter-case was served. Neither appellant's case, nor any counter-case, is on file in the Clerk's office, but appellant alleges that a copy of his case is on file in the Clerk's office, and asks for a *certiorari* to send this up as the true case on appeal.

Similar agreements are common on the circuit, but no case has heretofore arisen calling for a construction. The ambiguity in the one above set out attaches to the meaning to be given to the word "thereafter." If it meant thirty days after the service of appellant's case, then, though appellee served his counter-case on June 25th, as he alleges, he was too late, and the appellant's case should be certified alone as the "case on appeal." If, however, "thereafter" means thirty days after the expiration of the first thirty days, then defendant's counter-case, if served on June 25th, was in time, and the appellant was direlict in not "immediately" requesting the Judge to settle the case as required by §550 of *The Code.*

The written agreement of counsel substituted the time specified therein—of thirty days to appellant to serve case and thirty days thereafter to serve counter case—for the statutory ten and five days, respectively, provided by chapter 161, Acts 1889, amendatory of *The Code*, §550. The five days (formerly three) in which appellee can serve his counter-case is to be counted from the service of appellant's case on appeal, and not from the expiration of the ten days (formerly five). We are of opinion that the proper construction of the agreement would give appellee thirty days in which to make out his counter-case, *i. e.*, counting from service of appellant's case. If he wished for the other arrangement he could easily have specified "thirty days after adjournment of Court, to serve case on appeal, and sixty days from adjournment to serve counter case," or use other unambiguous language.

Inasmuch, however, as the appellee evidently understood the words differently, and has been (not unreasonably) misled thereby, the Court would ordinarily continue the case till the controverted fact of service of a counter-case is found by the Judge below. *Walker* v. *Scott*, 102 N. C., 487. But in this instance neither the appellant's case nor the alleged counter-case is on file, and a further controversy will doubtless arise as to the contents of the defendant's counter-case (if it should be found to have been served), and possibly as to the correctness of the alleged copy of the plaintiff's case now on file. Under the peculiar circumstances of this case, the Court will remand it, with leave to appellant to serve a new case on appeal within ten days after a certified copy of this opinion is filed in the office of the Clerk of the Superior Court for Bertie County. If the appellee does not assent to such case, he will, in five days after the service thereof, serve his counter-case, and the case will be "settled" by the Judge who tried the cause, under the statutory provisions. The Clerk of said Court will notify counsel of both parties immediately upon receipt of the certified opinion of its purport. Upon "settlement of the case" in accordance herewith a duly certified copy will be transmitted to this Court.

Remanded.

N. J. BRITT, Administratrix, v. MUTUAL BENEFIT LIFE INS. CO.

Pleading—Insurance.

In an action on a policy of insurance a copy of the application need not be set out in the complaint.

CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1889, of GREENE Superior Court.

The defendant demurred to the complaint on the ground set out in the opinion. From the judgment overruling the demurrer the defendant appealed

Mr. George Rountree, for plaintiff.
Mr. George M. Lindsay, for defendant.

CLARK, J.: This was an action on a policy of life insurance issued by the defendant company. The complaint alleged the incorporation, the issuing of the policy sued on (a copy of which is set out), the death of the assured and the qualification of plaintiff as administratrix, the payment of all premiums by the assured, the notice and proofs of death given to the defendant, and demand for payment of amount due on policy; and also further, "that the said James P. Britt, deceased, and this plaintiff have duly fulfilled all of the conditions and stipulations required of them by the said policy or contract of insurance."

The defendant demurred to the complaint upon the ground that the application for insurance should have been set out in the complaint, and that plaintiff should have averred "that the representations made in said application for said policy of insurance were in all things true—said representations having been warranted to be true by the terms of the policy, and being in the nature of a condition precedent to the plaintiff's right to recover."

There was another ground of demurrer assigned, but it was abandoned in this Court.

The policy provides: "In consideration of the representations made in the application for this certificate, which are warranted to be true in all respects, and are hereby made a part of this contract," and the payment by the insured of the premiums specified, the certificate or policy of insurance is issued. No copy of the application was annexed to the policy when issued. The policy sued on is the whole of the obligation assumed by the defendant. This action is brought to compel a performance of that, and it is set out in full in the complaint. The application is, by the agreement, made a part of the contract, but it contains only stipulations which bind the assured. It is in possession of the defendant, and if there is a breach of any of its terms which will release the defendant company from its obligation, it is for the defendant to set out such obligation and aver the breach or breaches thereof on which it relies. *Mutual Benefit Life Ins. Co.* v. *Robertson*, 59 Ill., 123; 1 Chit. on Pleading, 299.

The provision in the policy, that the representations in the application are warranted to be true and are made a part of the contract, in no wise changes the rule that when a breach of a warranty or stipulation is relied upon as a defence, the defendant must allege such warranty and its breach. Where the whole contract is in one paper, and the warranties are contained therein, the plaintiff, if he sets out a part of the contract, should set out the whole. Here the contract consists of two distinct but inter-dependent obligations. One is the obligation of the defendant to pay a sum certain to the personal representative of the assured upon the death of the latter, the previous regular payment of premiums by him, and due notice and proof of death. This is a full, complete and perfect contract in itself, and the only conditions precedent, accurately speaking, are the payment of premiums, death, and furnishing proof thereof. The other contract is that of the assured. It is not so much a condition precedent as a defeasance by which the assured contracts that the representations made by him are warranted true, and if untrue, the contract of defendant company shall be defeated and annulled. This defeasance was committed to the custody of the defendant, and if it relies upon any protection therefrom, it should set out the application and allege specifically the false statements relied on.

The plaintiff has alleged specifically the performance of the conditions precedent—*i. e.*, the payment of all premiums, the death of the assured, and the proof thereof given as stipulated. If, however, as defendant contends, the truth of the representations in the application should be averred because, as he insists, they are conditions precedent, the plaintiff has complied with *The Code*, § 263, which is: "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party *duly performed all the conditions on his part.*"

It does not lie within the scope of this decision to pass upon the interesting question, which was ably discussed before us, of upon whom rests the burden of proving the truth or falsity of the representations made by the assured. The demurrer raises the sole question, whether it is incumbent on the plaintiff to set out the application for the policy in an action upon the policy, and to aver the truth of the statements made in such application.

We are aware that a contrary opinion on this point has been held in *Bobbitt* v. *Ins. Co.*, 66 N. C., 70, but in that case it seems to have been purely an *obiter dictum.* The question of the omission of the application from the complaint is not raised by the pleadings, nor in the briefs of the able counsel on either side (which are printed with the case), nor in the statement of the controverted points as recited by the learned Judge who delivered the opinion. After expressing an opinion that the truth of the representations in the application was in the nature of a condition precedent, it holds that therefore the application should be set out in the complaint, and Archbold on Pleading is cited. Such certainly was the former rule of pleading, which required great particularity and fullness in pleading conditions precedent and their performance. Stephens on Pleading, 334. We think that the Court must have been inadvertent to the complete change in that respect made by the Code of Civil Procedure (§ 263), which had not then been very long in force. Bliss on Code Pleading, § 301.

A careful examination of the reports of our sister States shows only one case in which it is held that the application must be set out in the complaint, and in that instance *Bobbitt* v. *Ins. Co.* is cited for the ruling, and no reasoning nor other authority is given. On the contrary, the rule seems to be as stated, 1 Boone on Code Pleading, § 156: "All that is necessary in the complaint to make out a cause of action upon a policy of life insurance is a statement of the contract, the death of the assured, and the failure to pay as agreed (*Murray* v. *Ins. Co.*, 85 N. Y., 236); an allegation that the death of the assured was not caused by the breaking of any of the conditions of the policy is unnecessary; the plaintiff is not bound to anticipate in the complaint the defence which the defendant may set up, and has a right to rely in complaining upon such averments as state a cause of action, leaving matter which would meet a defence for proof or argument at the trial. *Cohen* v. *Ins. Co.*, 96 N. Y., 300"; *Piedmont Ins. Co.* v. *Ewing*, 92 U. S., 377.

It is held that as to promissory warranties by which the assured obligates to do certain acts—such, for instance, as payment of premiums and furnishing proof of death, &c., the party suing on the policy must aver and prove these; but as to the alleged breach of warranty in the statement of existing facts as to health, habits, &c., of the assured, the defendant should aver and prove them. *Swick* v. *Home Life Insurance Co.*, 2 Dillon, 160; *Van Valkenburg* v. *Ins. Co.*, 70 N. Y., 605; *N. Y. Life Ins. Co.* v. *Graham*, 2 Duvall, 506. Being in the nature of allegations of fraud, the presumption is of innocence, and the defendant must aver the untruthfulness of the statements in the application. *Trenton Ins.*

Co. v. *Johnson*, 4 Zab., 580; *Leete* v. *Gresham Ins. Co.*, 7 E. L. & E. R., 578; *Jones Mfg. Co.* v. *Mfrs. Ins. Co.*, 8 Cushing, 84. The declarations in the application are presumed to be true, and the defendant company must aver and prove them untrue. *Holabird* v. *Atlantic Ins. Co.*, 2 Dillon, 166; *Granger Ins. Co.* v. *Brown*, 57 Miss., 315. In a case where the defendant here seems to have been a party, and raising the same point as now (*Mutual Benefit Life Ins. Co.* v. *Robertson*, 59 Ill., 123), it is held: "Appellee (the assured) was not bound to set out the application. This paper must have been in the custody of the appellant. The company might have introduced it, and proved its representations to be false"; and in the same case it is held "a *prima facie* case was made in behalf of appellee by the introduction of the policy, the renewal receipt and proof of death." The *Ins. Co.* v. *Stanton*, 57 Ill., 354, which, like *Bobbitt* v. *Ins. Co.*, was a fire insurance case, is to the same effect.

Affirmed.

N. P. BULLOCK v. THE WILMINGTON & WELDON RAILROAD COMPANY.

Negligence—Accident at Railroad Crossing.

1. In an action against a railroad company for the destruction of a portable steam-engine, which had stalled on a crossing, it appeared that the driver, on seeing a train turn a curve about one thousand yards distant, ran up the track, waving a handkerchief, and that the engineer made no effort to stop the train until within about three hundred yards of the crossing, although he noticed the driver waving his handkerchief as soon as he turned the curve, and his fireman called his attention to the obstruction when he was about six hundred yards from the crossing: *Held*, that the engineer was negligent, if, by watchfulness, he could have seen that the road was obstructed in time to stop his train before reaching the crossing.

2. Where it appeared that plaintiff's driver went on the track to see whether any train was approaching before he attempted to cross, the fact that he did not examine the crossing and that he did not look at his watch to see whether it was about train time, does not constitute such contributory negligence as will prevent plaintiff from recovering, it appearing that the stalling would not have occurred if the crossing had been in good condition.

This was a CIVIL ACTION, tried at the Fall Term, 1889, of the Superior Court of EDGECOMBE County, before *Boykin, J.*

The plaintiff, in his first cause of action, alleged that he was the owner of a portable steam-engine and boiler, which he was attempting to have drawn across defendant's track by two teams of oxen, when defendant's servant negligently ran an engine and train over said portable engine and boiler. In the second cause of action, he alleged that it was the duty of the defendant to keep up a certain crossing over its track, and defendant neglected to do so, in consequence of which said engine and boiler were injured in the attempt to transport them over said road at said crossing.

The defendant denied generally each allegation of the first cause of action, except the allegation as to the existence of the corporation, and set up contributory negligence. In answer to the second cause of action, the defendant admitted the obligation to keep the crossing in repair, denied negligence and charged contributory negligence.

The issues and findings were as follows:

1. Was the steam-engine and boiler mentioned in the complaint injured by the negligence of the defendant?

Answer—Yes

2. What damage has the plaintiff sustained?

Answer—$600.

The plaintiff claimed damages for the destruction of his portable steam-engine by the negligence of the defendant.

George W. Harper, a witness for plaintiff, testified: "I was ginning cotton for Bullock last fall with a portable engine drawn by four oxen. On the 25th day of October, 1888, I was driving the same, with the assistance of three men, from a point in Edgecombe to a point in Nash County, when I had occasion to cross the line of the defendant's railroad track at a public crossing known as Trevathan's Crossing. As I approached the crossing, I stopped the team and went upon the track to see if any train was coming from any direction; I could have seen a train more than a thousand yards in the direction of Battleboro; I have measured it since then, and a man standing on the track at the Trevathan Crossing can be seen by another standing on the track one thousand and seventy yards North of that point. I had been working in the neighborhood for some time, and knew the time the South-bound train usually passed that point; I had a watch with me that day, but did not look to see the time; I think the train was behind time this day, and I thought it had passed when I reached the crossing; I went upon the track to see if there was any train coming from any direction; frequently there were special trains. Neither seeing nor hearing any train, I then undertook to cross the track. The crossing was very bad; the approach to the track on the Edgecombe side was slightly elevated, and the rise from the level of the ground to the top of the railroad iron was about nine inches. The team pulled the first wheels of the engine over the nearest rail, and when they struck the further rail, and the hindmost wheels the first rail, the engine got stalled. I had no time to try and get the team over, because just at this time I saw the South bound train, coming from the direction of Battleboro, turn the curve one thousand and seventy yards distant, and I thought it best for me to run up the track and wave down the train. I at once ran up the middle of the track in the direction of the approaching train, waving a red handkerchief over my my head. The train did not slacken in its speed until within about one hundred yards of the crossing, when the engineer jumped from the engine on the right and a colored man jumped on the left; after knocking the obstruction off the track the hindmost car stopped at the crossing. The oxen were in good order; they had only come about a mile that day, and I thought they could pull the engine across without much difficulty; they had often pulled out of worse places, and had frequently pulled over 'railroad crossings.'"

The plaintiff offered other testimony to the effect that the crossing was in bad condition; that the rise from the level ground to the top of the railroad iron was from six to eleven inches; that the crossing was, in effect, no crossing; that one of the witnesses had had occasion to put planks in the crossing in order to haul cotton on, and had found it bad for crossing with light vehicles; that the engine weighed twenty-seven hundred pounds; that an engineer could have seen the team and engine stalled upon the track as soon as he turned the curve, which was estimated by one witness, who had not measured it, as from six to eight hundred yards; by another, who had stepped it, as eleven hundred and fifty yards; and by two, who had actually measured it, it was said to be one thousand and seventy yards; that as soon as the engineer turned the curve he could have recognized that the team and the engine upon the track were stalled; that when within about one hundred yards of the crossing, the engineer reversed the engine, applied all means to stop the train, and jumped from the engine.

It was in evidence, on the part of the defendant, from the testimony of the section-master of the defendant's road, of the attorney of the road, who visited the crossing a few days after the accident, and of several other employes of the road, that the crossing in question was in good condition—as good as the other crossings upon the same section of road.

It was testified to by the engineer in charge of the train, that as soon as he turned the curve he saw the obstruction upon the track, and the man running up the track waving his handkerchief; that he had been running trains on the defendant's road for seventeen years, and that he did not know whether the curve was two hundred or twelve hundred yards from the crossing; that he blew the regular signal at the whistle post, which was some three hundred or three hundred and fifty yards from the crossing; after that he blew the cattle signal and then reversed the engine, and used every appliance to stop the train; that, seeing it was then impossible to stop the train, he jumped off the engine; that the train was equipped with the best appliances known to science, and the train could not have been stopped in less than three hundred and fifty or four hundred yards; was on schedule time and going thirty-five miles per hour. It was in evidence by the fireman that he called the engineer's attention to the obstruction on the track when six hundred yards distant from it.

Counsel for the defendant requested the Judge to charge the jury—

1. That in law, if the jury believed the evidence introduced in behalf of the plaintiff, he is guilty of contributory negligence and is not entitled to recover in this action.

2 That when the engineer of defendant's train first saw the team of oxen and vehicle upon the railroad track, the law did not require him to stop or slacken the speed of the train until he realized the team of oxen and vehicle were stalled or could not get off the track.

3. That if you believe the defendant's engineer did all in his power to stop the train, and at once, when he realized that the team of oxen and engine were stalled, the defendant was not guilty of negligence, and plaintiff cannot recover.

4. That if the engineer, so soon as he saw the man on the track waving at him, did everything in his power to stop the train, the defendant was not guilty of negligence, and plaintiff cannot recover.

The Court gave the third prayer, and, among other things, charged the jury—

That it was required of the plaintiff, his agents and servants, that they should exercise due and proper caution in crossing, or attempting to cross, the defendant's track, to learn whether there were any approaching trains, and to notice the condition for safety of the railroad crossing. If the crossing was in such condition as to suggest to a man of ordinary prudence and caution, under all the circumstances of the case, and considering the distance at which approaching trains could be seen, the difficulty or danger of attempting to cross with such a team and such a burden, then it was their duty to forbear, and their entering upon the track under such circumstances would make the plaintiff guilty of contributory negligence; and if the engineer of defendant company, in the exercise of reasonable care, was unable to avoid the accident, then the plaintiff would not be entitled to recover. If, when the engineer first discovered that the team and engine on the track were stalled (the plaintiff having entered upon the track under such circumstances as made him guilty of contributory negligence as above stated), he exercised reasonable care and made use of the means in his power to stop the train and avoid the accident, but failed to do so because the want of space or the down-grade of the road, then the defendant would not be liable. But, if the defendant's engineer saw the team and engine stalled upon the track in full time to have avoided the accident by the reasonable use of the means within his reach, but delayed too long their application, and accident thereby resulted, then the plaintiff is entitled to recover. The fact that plaintiff was chargeable with contributory negligence in entering upon the track, if you should so find, does not necessarily preclude the plaintiff from recovering; for notwithstanding the plaintiff's negligence in going upon the track, he would still be entitled to recover, if the defendant's engineer could have avoided the accident by the exercise of reasonable care, as before explained.

The jury answered both issues in favor of the plaintiff. Motion for a new trial; motion denied.

The defendant assigned—for, 1st, Error in the refusal of the Court to give the instructions asked; 2d, Error in the instructions given.

From the judgment rendered, the defendant appealed.

Mr. Donnell Gilliam (by brief), for plaintiff.

Mr. John L. Bridgers (by brief), for defendant.

AVERY, J.—after stating the facts: When a person in charge of a wagon and team approaches a public crossing, at which he proposes to pass over a railway track, it is his duty, even though no train is expected at that hour, to look and listen and take every precaution that prudence would suggest to avoid a collision. Wood's R. L., p. 1302.

According to the undisputed testimony, the witness who was in charge of the wagon went upon the track, in person, without venturing with the team, and, looking in the direction from which the train that injured the engine subsequently came, saw the line clear for more than a thousand yards to a curve (which was, in fact, afterwards ascertained by measurement to be one thousand and seventy yards distant from the crossing).

The defendant company contends, not without reason, that if, in the view of the testimony most unfavorable to the plaintiff, his negligence did contribute, or might have contributed, concurrently with that of the defendant, to cause the injury, the Court should have given the jury such specific instruction as was necessary to apply the law to that particular phase of the testimony, if requested to do so by the counsel of the company. This principle, it is insisted, can be applied, if we suppose—considering some portions of the testimony offered on both sides to be true—that the plaintiff's agent, after seeing that there was no train as near as the curve, drove his team upon the crossing without looking at his watch, when a glance at it would have notified him that it was about the time when the train usually passed, and when he knew, or, by examination, might have ascertained the condition of the crossing, and especially that, in order to draw the wagon containing the engine across the track, the wheels must overcome a perpendicular rise of nine inches. The company admits in its answer the duty of keeping the crossing in good condition, and, upon the hypothesis which we are now assuming to be true, was guilty of negligence in failing to repair it. Wood's R. L., § 420; *Gray* v. *Railroad Co.*, 36 Iowa, 112. The defendant company will not be allowed to excuse the negligent running of its trains if its engineer was shown to be in fault in destroying an engine detained on the crossing on account of its own omission to make the public highway passable. The plaintiff's agent was not wanting in ordinary care because he did not inspect the crossing to see whether the company had discharged its duty before venturing upon it, nor is the single circumstance that he failed to look at his watch sufficient to show culpable imprudence, because he could have passed over safely if the crossing had been in good condition. Where a teamster crossed a bridge that he actually knew to be somewhat unsafe, but which the county officers had not closed or warned people not to pass, it was held by the Supreme Court of Pennsylvania that he was not in fault and could recover for injuries sustained thereby. *Humphrey* v. *Armstrong*, 56 Penn., 204; *Alger* v. *Lowell*, 3 Allen, 402; *Robinson* v. *Proche*, 5 Cal., 460.

Wood, in his work on Railway Law (§ 323, p. 1314), says: "If a person, in crossing a railroad track, in the exercise of due care *as to approaching trains, through no fault of his, gets the wheels of his vehicle caught in the track so that he cannot* *extricate them in season to avoid injury* from an approaching train, he is not *chargeable with such negligence as will preclude a recovery* for injury to his team, *if he properly endeavors to cause the train to be stopped.*" *Railroad Co.* v. *Dunn*, 56 Penn. St., 280; *Milwaukee Railroad Co.* v. *Hunter*, 11 Wis., 160.

The engineer testifies that he saw Harper running up the track waving his handkerchief as soon as he turned the curve (one thousand and seventy yards from the crossing), and the fireman states that he called his attention to the obstruction six hundred yards from the crossing. This is in accord with Harper's statement that he ran up the road, making the signal to stop, so soon as he discovered that the team was *stalled.*

Instead of leaving the question of contributory negligence to the jury at all, his Honor might have told them that the plaintiff had not, in any aspect of the evidence, contributed, by his own want of care, to cause the injury sustained. As the erroneous instruction was favorable to the defendant, it is unnecessary to analyze or discuss so much of the charge as relates to contributory negligence

There may be mutual negligence, and still one party may maintain an action against the other. When a man negligently lies down and falls asleep in the middle of the public road, and another, who sees him, failing to exercise ordinary care, drives over and injures him, an action will lie for the injury. *Kerwocker* v. *Railroad Co*, 3 Ohio St., 172; *Davies* v. *Mann*, 10 Mees & W., 545 It is upon this principle that his Honor acted in instructing the jury. The authorities fully sustained him in the position, that even if the plaintiff did not exercise due caution in venturing upon the track under all the circumstances, still the defendant was liable to answer in damages for the injury sustained, if by the exercise of ordinary care on the part of its servants it might have been prevented. *Gunter* v. *Wicker*, 85 N. C., 310; *Troy* v. *Railroad Co.*, 99 N. C., 298; *Farmer* v. *Railroad Co.*, 88 N. C., 564; Shearer & Redfield on Neg., sec. 36; Cooley on Torts, 679; *Blaine* v. *C. & O. Railroad Co.*, 9 W. Va., 252; *B. & O. Railroad Co.* v. *State*, 33 Md., 542.

It is the duty of an engineer, when running his engine, to keep a constant "lookout for obstructions, and when an obstruction is discerned, no matter when or where, he should promptly resort to all means within his power, known to skillful engine-drivers, to avert the threatened injury or danger." Woods' R. L, sec. 418, p. 1548; *S. & N. Ala. Railroad Co* v. *Williams*, 65 Ala., 74; *Ibid* v. *Jones*, 66 Ala., 507. If the engineer, so soon as he discovered that the wagon was detained upon the track and could not, for the time, get out of the way, or so soon as with *proper care and watchfulness he would have had reason to think such was its condition*, had used every means and appliance in his power to stop the train, the defendant would not have been liable. But the Judge omitted to tell the jury that it was negligence on the part of the defendant, if the engineer could have seen, by watchfulness, though he did not in fact see, that the road was obstructed in time to stop his train before reaching the crossing. *Carlton* v. *Railroad Co.*, 104 N. C., 365; *Wilson* v. *Railroad Co.*, 90 N. C., 69; *Snowden* v. *Railroad Co.*, 95 N. C., 93. The defendant could not complain of this error.

It is true that, ordinarily, an engineer has a right to assume that one who has time will get out of the way, but he is not warranted in acting upon this assumption after he "has reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals." *French* v. *Phila. Railroad Co.*, 39 Md., 574. Counsel for the defendant, in his brief, states that there was testimony tending to show that the curve was only two hundred yards from the crossing; but we cannot look beyond the case on appeal, and there it appears that the witnesses estimated the distance at from six hundred to twelve hundred yards, two swearing that they measured, and one that he stepped it, and made it over one thousand yards. The engineer testified that *he did not know* whether it was twelve hundred or two hundred yards That was not evidence to show that the distance did not exceed the shorter distance mentioned by him. The engineer testified that he saw the obstruction on the track as soon as he turned the curve, and at the same time saw the man running up the track making the signal, and that he could have stopped his engine by the use of the appliances at his command within three hundred and fifty yards. It would seem that he had sufficient reason to believe that those in charge of the team had encountered some difficulty, when he saw it on the track, and the witness Harper running and waving his handkerchief. But if that were not so, the fireman testified that he called the attention of the engineer to the obstruction when he was six hundred yards from the wagon, and when, according to his own estimate, he might have stopped his train two hundred and fifty yards short of the crossing. But he went on, according to his own testimony, within some three hundred or three hundred and fifty yards, but, as the result proved, too far to save the plaintiff harmless.

Applying the law to this state of facts, it would seem that the plaintiff might have complained of his Honor's charge as to the liability of the defendant by reason of its own negligence, but, like the instruction relating to contributory negligence, it was more than fair to the defendant. The defendant company has failed to point out any error that entitles it to a new trial. There is no error.

Affirmed.

ROMULUS BAZEMORE et al. v. ROBERT M. BRIDGERS et al.

Counter-claim—Practice—Demurrer—Premature Appeal.

1. In an action for trespass for wrongful entry on land and cutting timber, where the defendants filed a counter claim, alleging that the plaintiffs had wrongfully raised a dam and ponded water back on defendants' land, which was part of the land described in the complaint as that on which the alleged trespass had been committed: *Held*, that the counter-claim was not connected with cause of action, and that a demurrer thereto was properly sustained.
2. An appeal from a judgment sustaining such demurrer is premature.

CIVIL ACTION, tried at Spring Term, 1889, of BERTIE Superior Court, before *Montgomery, J.*

The plaintiffs brought this action to recover damages for alleged trespasses on their land, particularly described in the complaint. They allege, among other things, as follows:

1. "That defendant unlawfully and wrongfully entered upon said land and have cut and carried away cypress and other timber, to the plaintiffs' damage five thousand dollars.

3. "That said acts of trespass were committed on the 1st day of June, 1872, and at various other times subsequent thereto, and before the bringing of this action."

The defendants deny the material allegations of the complaint, and allege further, as follows:

9. "For further answer, and by way of counter-claim, the defendants, R. M. Bridgers and his wife, say that the plaintiffs and their father, James Burden, and their tenant, S. H. McRae, have, without authority, wrongfully and unlawfully raised the dam at Burden's Mill two feet or more, so as to pond the water back on the land of the said Bridgers and wife, and thereby damage said land one thousand dollars.

"Wherefore the defendants demand judgment—

1. "For the sum of one thousand dollars.

2. "That the plaintiffs be required to lower the dam at the Burden Mill two feet," &c.

The plaintiffs demur to the counter-claim so alleged, and assign as grounds of demurrer, as follows:

1. "It is not a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiffs' claim, or connected with the subject of the action.

2. "It is not such demand as can be set up as a counter-claim in this action."

The Court gave judgment sustaining the demurrer, and the defendants, having excepted, appealed.

No counsel for plaintiffs.

Mr. R. B. Peebles, for defendants.

MERRIMON, C. J.—after stating the case: This appeal was taken prematurely. The defendants should have had their exception noted in the record, and they might have had the benefit of it in an appeal from the final judgment. If, in that case, their exception should be sustained, they would then have the benefit of their counter-claim in the course of the action and a trial upon its merits—otherwise, in the absence of other exceptions, the judgment would be affirmed and the action ended without the delay and expense occasioned by multiplied and unnecessary appeals in the same action It has been so repeatedly decided. *State* v. *McDowell,* 84 N C., 798; *State* v. *Polk*, 91 N. C., 652; *Knott* v. *Burwell*, 96 N. C., 272.

We are requested to express our opinion as to the merit of the single exception, and, as it may prevent another appeal, we will do so. In our judgment the demurrer was properly sustained. It was contended, on the argument, that the alleged counter-claim should be upheld as such, on the ground that it is "connected with the subject of the action." This clearly cannot be so. The cause of action alleged in the complaint—in the language of the statute, (*The Code*, § 244, par. 1)—"the subject of the action," is not the land, but the alleged trespasses on it, and the cause of action—alleged indefinitely and imperfectly as a counter-claim—is in no way connected with them, so far as appears. What connection has the alleged interference of the plaintiffs with the mill-dam of the defendants to do with the trespass alleged in the complaint? We have not been told, and we cannot see that it has any whatever.

The appeal must be dismissed. Dismissed.

A. BRANCH et al. v. JOHN GALLOWAY.

Agricultural Lien—Advancements—Landlord's Lien—Retaining Title.

The defendant, a landlord, on January 1, 1887, rented out certain lands belonging to him and rented other lands from one W., who advanced supplies to him and sold him a mule, retaining title verbally as security for the purchase money. In January and July following, defendant made agricultural liens to plaintiffs, and, from time to time, received advancements thereon to cultivate both his own and his tenant's crops: *Held*—

1. That W. had a prior lien to plaintiffs for supplies advanced.
2. That, as it did not appear that the mule was a part of such supplies, there was a prior lien on the crop as to it, and W. could not retain the crops for its purchase money.
3. The use of the mule in the cultivation of the crops did not necessarily make it an advancement.

Civil action, tried at Spring Term, 1889, of Wilson Superior Court, *Armfield, J.*, presiding.

The following "case agreed" was submitted to the Court for its judgment thereupon:

1. That on the first day of January, 1887, the defendant owned a tract of land in said county which he rented for that year to James Galloway, Henry Rodgers and Sampson Green, reserving to himself a certain portion of the crops to be made during said year as rent.

2. That on January 1, 1887, the defendant rented from J. T. Ward the land cultivated by defendant during the year 1887, and that said Ward furnished the defendant during the year 1887 with advances in merchandise to the amount of fifty dollars.

3. That on the said first day of January, 1887, the said Ward sold to defendant the mule in controversy for the sum of one hundred and fifty dollars, retaining title to same as security for the payment of the purchase money, and which mule the defendant used in the cultivation and saving of the crops raised upon the lands of the said Ward.

That said sale and agreement between Ward and defendant were not made in writing.

4. That on the 24th day of January, 1887, the defendant executed to plaintiffs an agricultural lien, and on June 2, 1887, the defendant executed to plaintiffs another agricultural lien.

5. That plaintiffs advanced to the defendant, before the 20th day of July, 1887, merchandise and supplies, which were expended in the cultivation and saving the crops raised upon the lands of the said Ward and defendant, to the amount of three hundred and seventy-one one-hundredths dollars.

6. That plaintiffs received, during the said year 1887, all the crops and personal property conveyed in said above-mentioned agricultural liens (except the corn, fodder and cotton seed used by the defendant in making the crops raised during the year 1887, and the crops retained by the defend-

ant's landlord, J. T. Ward, and hereinafter referred to), to the amount of $213.71.

7. That on or about the 10th day of December, 1887, the said Ward retained of the crop raised by defendant during said year enough to pay him the sums due by defendant for said mule and the advancements referred to in paragraph 2, and delivered the balance of said crops to plaintiffs.

8. That the defendant has not five hundred dollars' worth of personal property.

9. That in January, 1888, plaintiffs instituted this action in this Court for the recovery of said mule, and seized him by process of claim and delivery in the hands of the Sheriff.

Wherefore, the plaintiffs insist that they have a right to be subrogated to the rights of J. T. Ward in said mule, and are the owners and entitled to possession of the same.

The defendant insists that he has a right to said mule as a part of his personal property exemption, and denies the right of plaintiffs to any interest in, claim upon, or right to said mule whatever.

The Court gave judgment in favor of the plaintiffs, and the defendant, having excepted, appealed.

Mr. F. A. Woodard (by brief), for plaintiffs.
Mr. J. D. Bardin (by brief), for defendant.

MERRIMON, C. J.—after stating the case: The agricultural liens of the plaintiffs seem to partake of the nature of chattel mortgages, but they do not embrace the mule in question, and we are unable to see any ground upon which they can sustain their claim to it. Their liens do embrace the defendant's crops, but as to the crops produced upon the land the defendant leased from Ward, they were subject to his prior first lien as landlord. The landlord, as to the land he let to the defendant, had a first lien upon the crop produced thereon to secure the rents and advancements made by him to make the crop. The mule, although it was used in cultivating the crop, was not necessarily, on that account, such an advancement, nor does it appear that it was such. On the contrary, it appears that it was not such. It is expressly stated that Ward sold it to the defendant, retaining the title "as security for the payment of the purchase money," and this might be done, though the mule was really an advancement. If it was intended to be, and treated as an advancement to aid in making the crop, this should distinctly appear. Whether such sale was valid or not, the landlord had no lien upon the crop of his tenant for the price of the mule, unless it was, in fact, an advancement, or he had a mortgage of the crop to secure the same. It does not appear that it was the former, nor that he had such mortgage. Ward had no lien on the crop as to the price of the mule, and, therefore, no right to take so much of the crop as would suffice to pay it, and the defendant had no right to pay the same with part of the crop until the plaintiffs' liens on it were discharged That the defendant did so could not have the effect to put the title to the mule in the plaintiffs. They had no such title acquired by purchase, gift, judgment or decree of a Court, or otherwise. At most, they had only an equitable right; and if it be granted that they might follow the crop, as contended by their counsel, this is not an action for that purpose, but for the purpose of recovering the mule, specifically, as their property.

There is error. The judgment must be set aside, and judgment entered for the defendant.

Error.

L. GREEN et al. v. HENRY SHERROD.

Deed—Redemption Clause—Mortgage.

A deed absolute on its face, but intended as a mortgage, cannot operate as such unless it is alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage.

This was a CIVIL ACTION, tried before *Connor, J.*, at April Term, 1889, of the Superior Court of FRANKLIN County.

The following issue was, by consent, submitted to the jury: "Was the deed set out in the complaint intended as a mortgage. If so, was clause for redemption omitted by mistake of the draftsman?

The defendant introduced B F. Bullock, who, after being sworn, testified: "I wrote the deed from defendant to Green & Ryland during the year 1875; a note was executed by defendant to the grantee about the time the deed was made; the debt had been contracted before then; to secure a certain portion of this note, defendant agreed to convey to them a house and lot in Franklinton, with the understanding that when the debt was paid they were to let him redeem the property and reconvey to him; I wrote the deed from Green & Ryland to W. W. Green; I told him that the deed was absolute on its face, but was intended as a mortgage to secure a debt."

This being the entire evidence, the plaintiff requested the Court to instruct the jury that they should answer the issue in the negative. The Court so instructed the jury and verdict was rendered accordingly. Defendant excepted and appealed.

Mr. C. M. Cooke, for plaintiffs.

Mr. N. Y. Gulley (by brief), for defendant.

Avery, J.—after stating the facts: In *Norris* v. *McLam*, 104 N. C., 159, Justice Shepherd, delivering the opinion of the Court, says: "It is well settled, that in order to convert a deed, absolute on its face, into a mortgage, it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." *Egerton* v. *Jones*, 102 N. C., 278.

There is no error. Affirmed.

*W. G. BLOW et al. v. ROBERT VAUGHAN et al.

Deed—Description of Land—Evidence.

1. Where the description in a *deed* offered to show title was "fifty acres of land lying in the county of Hertford and bounded as follows: By the lands of John H. Liverman, John P. Liverman and Isaac J. Snipes": *Held*, that the language left open for explanation by parol proof only the question whether there was a tract of land in Hertford County containing fifty acres, and so bounded by the lands of the three persons named, as to separate it from other tracts and indicate its limits with reasonable certainty.
2. In the *complaint* filed the land was described as "adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres: *Held*, that the description in the complaint was too vague to be explained by parol testimony, and if the transcript was correctly copied in the complaint, the action might have been dismissed for failure to state facts sufficient to constitute a cause of action, or after the evidence was heard the jury might have been told that there was a fatal varience between the allegations and the proof.
3. A deed that contains no descriptive word or phrase sufficient, with the aid of competent extrinsic testimony, to identify and determine *all of its boundary lines*, will not pass any estate to the bargainee therein named.

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*Head notes by Avery, J.

4. The test of the admissibility of evidence *dehors* the deed is involved in the question whether it tends to explain some descriptive word or expression contained in it, as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The rule is founded on the maxim, "*Id certum est quod certum reddi potest.*"
5. The rule that the descriptive words in the deed must, with the aid of the *evidence aliunde*, to which they *point*, identify the boundaries of the land conveyed, has been sanctioned by the Courts, not only upon the idea that there must be a certain subject-matter, but because its observance is essential to a proper enforcement of the statute of frauds.
6. The sufficiency of descriptions in levies were made to depend, in some instances, upon the construction given by the Courts to the statute (Rev. Code, §16, ch. 62), prescribing what they should contain, and hence the Courts held descriptions in levies sufficiently definite that have been declared too vague in deeds of conveyance.
7. Proof in this case that a tract of land, containing one hundred and twenty-five acres and belonging originally to John W. Blow, from whom the ancestor of plaintiffs claimed, was completely surrounded and bounded by the lands of the three persons named in the deed, will not identify the land which the deed purports to convey, because there is no testimony to show in what part of it the fifty acres is to be laid off. (*Hinton* v. *Roach*, 95 N. C., 106, overruled.)

This was a CIVIL ACTION, brought to recover possession of, and establish title to, a tract of land, tried at Fall Term, 1889, of HERTFORD Superior Court, before *Brown, J.*

The land in controversy was described in the complaint as follows: "Adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres." In the deed offered in evidence to show title derived from John W. Blow, the common source, in Henry B. Blow (under whom plaintiffs claim by descent), the land is described as "fifty acres of land lying in the county of Hertford and bounded as follows, by the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes."

J. H. Liverman testified: "The land described in the deed from John W. Blow to H. B. Blow is the same land described in the complaint. The fifty acres described in the complaint lay in a corner, and is called the Manly tract; it is not a separate piece of land. John W. Blow only owned two tracts—called the home place and the Snipes tract—said to be 125 acres, more or less. John W. Blow did not have a tract of land bounded by John P. and J. H. Liverman and Isaac J. Snipes, that I know of; I don't know whether it would touch all of them or not; don't know whether this fifty acres touched Isaac J. Snipes or not; John W. Blow's Snipes tract was bounded by all said parties. There was no separate fifty-acre tract; the fifty acres described in the complaint is a part of the Snipes tract, Major Wise being in possession thereof. This tract is called the Manly tract; it is part of the Snipes tract."

Plaintiffs rested.

Defendants offered the following evidence:

E T. Snipes testified: "In 1869 J. W. Blow owned the home place and the Snipes land; did not own or possess any other. Snipes tract bounded, in part, by J. P. and J. H Liverman and I. J. Snipes. The fifty acres in controversy, I think, is part of the Snipes land. The said boundaries do not especially fit or designate any particular part of the Snipes tract. The lands that Henry Blow lived on, and his brother Gus, is part of the Snipes tract. There is a portion of the Snipes tract that is not bounded by John P. and John H. Liverman, or Isaac J Snipes. Henry Blow's house is in the North-west corner of the Snipes tract. The Manly tract is an old name for the land, but no particular tract is called Manly land. The residences were known by certain names. Years ago, the whole was embraced in one tract, called the Snipes tract. The Snipes tract was composed of several tracts, one of which was called the Manly tract. The fifty acres called for in the deed to Henry Blow could not be cut off so as to be bounded by John P. and J. H. Liverman and Isaac J. Snipes"

Isaac J. Snipes testified for plaintiffs: "I owned Snipes tract. The piece in dispute was called the Manly field; don't know how much there was of it, or its boundaries; it was part of the Snipes tract; I conveyed the whole to John W. Blow. The Manly field touches John P. Liverman and my land, but don't know whether it touches John H. Liverman; known by that name."

B. F. Liverman testified for plaintiffs: "In 1870 the land in dispute adjoined John H. and John P. Liverman and Isaac J. Snipes; am certain the fifty acres conveyed to Henry Blow by his father adjoined all three of those persons, and the fifty acres can be laid off so as to adjoin all three. The land that Henry went into possession of after he got deed from his father touched the two Livermans and the Isaac J. Snipes land; I mean that it adjoined the land that Isaac J. Snipes sold to Reed. Henry Blow went into possession of the land described in his deed shortly after it was made, and he and his brothers and sisters have been in possession and cultivated it ever since, up to two or three years ago."

The defendant, in addition to other instructions asked for, requested the Court to charge the jury that, if they believed the whole of the evidence, the plaintiffs could not recover.

The Court instructed the jury as follows:

"That the deed from John W. Blow to Henry B. Blow was anterior to those under which defendants claimed, and the plaintiffs' right to a favorable response to the issues submitted depended upon the sufficiency of that deed; that the description in said deed was not so indefinite and uncertain as to render it void, but the Court had permitted the introduction of parol testimony to locate and identify the land and fit the description to the land claimed in the complaint, if that could be done, and that the burden of proof was upon the plaintiffs to satisfy the jury, by a preponderance of evidence, that the land described in the complaint is the same described in the deed to Henry Blow from John W. Blow, and if the jury are so satisfied, they should find for the plaintiffs upon the first issue, and if not, then for the defendants; that if the said fifty acres could not be located or cut off, at the date of said deed to Henry Blow, so as to adjoin the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, then the plaintiffs cannot recover, and you should find the issues in favor of the defendants; that if the description in said deed does not fit any particular piece of land, then the plaintiffs are not the owners, as alleged. If the fifty acres in controversy were located and agreed upon by John W. Blow at the time he made the deed to his son Henry, and Henry Blow went into possession and used and occupied it by the consent and knowledge of said John W. Blow, and such location adjoined John P. and John H. Liverman and Isaac J. Snipes, and accords with the description in the complaint and deed to Henry you should answer the first issue, Yes. If the land described and conveyed in the deed to Henry Blow is the same land described in the complaint, and the plaintiffs and Henry Blow have been in possession of the land described in the complaint, under said deed and under known and visible boundaries, from 1870 up to three years before this suit was brought, then you should answer the first issue, Yes."

Defendants excepted to the entire charge.

The jury answered the issues in favor of the plaintiffs.

The defendants moved for a new trial, assigning as errors the exceptions hereinbefore specifically enumerated and set forth. Motion overruled. Defendants appealed.

Mr. R. B. Peebles, for plaintiffs.

Messrs. R. W. Winborne and *E. C. Smith*, for defendants.

AVERY, J.—after stating the facts: The deed from John W. Blow and wife to Henry B. Blow, under whom plaintiffs claim immediately, contains only this description: "Fifty acres of land lying in the county of Hertford and bounded as follows, by the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes." The language of the deed leaves but one question open for parol proof. If the plaintiff could have shown that there was a tract of land in Hertford County, containing fifty acres, and so bounded by the lands of the three persons named in the conveyance as to separate it from other tracts and indicate its limits with reasonable certainty, it was competent for them to do so, but the deed could not have been made operative in any other way. *Harrell* v. *Butler*, 92 N. C., 20; *Allen* v. *Chambers*, 4 Ired. Eq., 126; *Grier* v. *Rhyne*, 69 N. C., 346; *Wharton* v. *Elborn*, 88 N. C., 345; *Capps* v. *Holt*, 5 Jones Eq., 153; *Dickens* v. *Barnes*, 79 N. C., 490; *Hinchey* v. *Nichols*, 72 N. C, 66; *President of D. & D Institute* v. *Norwood*, Busb. Eq., 65; *Cox* v. *Cox*, 91 N. C., 256; *Murdock* v. *Anderson*, 4 Jones Eq., 77; *Mason* v. *White*, 11 Barb. (N. Y.), 173.

In *Harrison* v. *Hahn*, 95 N. C., 28, the late Chief Justice SMITH, for the Court, says: "The office of the descriptive words is to *ascertain* and *identify* an object and *parol proof* is *heard, not to add to or enlarge their scope, but to fit the description to the thing described.* When they are too vague to admit of this, the instrument in which they are contained becomes inoperative and void." There is no testimony tending to show the location of fifty acres of land in Hertford County, bounded on all sides by the lands of the two Livermans and Snipes. A deed that contains no descriptive word or phrase that, with the aid of competent extrinsic testimony, will identify and determine all of its boundary lines, will not pass any estate in land to the bargainee therein named. In *McCormick* v. *Monroe*, 1 Jones, 16, Judge PEARSON says: "This case (referring to *Waugh* v. *Richardson*, 8 Ired., 470) differs from the case under consideration in that here the exception is 'two hundred and fifty acres, previouly granted.' This would point to the means by which the description in the exception may be made sufficiently certain to avoid the objective vagueness by aid of the maxim '*Id certum est, quod certum reddi potest.*' The test of the admissibility of evidence *dehors* the deed is involved in the question whether it tends to so explain some descriptive word or expression contained in it, as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The doctrine finds its support in the maxim cited by Judge Pearson.

Judge Gaston, in the case of *Massey* v. *Belisle*, 2 Ired., 170, stated the principle very clearly and concisely when he said that "every deed of conveyance must set forth a subject matter, *either certain in itself, or capable of being reduced to a certainty, by a recurrence to something extrinsic to which the deed refers.*"

The rule that the descriptive words in a deed, with the aid of the evidence *aliunde*, to which they point, must, in order to establish the validity, identify the boundaries of the land conveyed, has been sanctioned by this Court, not only upon the idea that there must be a certain subject-matter in the deed, but because its observance is essential to the proper enforcement of the statute of frauds. The evasion is as palpable and as dangerous a violation of the statute when it is accomplished by amending a void contract, as where the entire contract is proven by parol evidence.

A single word in a deed is sometimes held sufficient to show with certainty the source from which information may be sought to determine definitely whether the title to any land rests in a grantee or bargainee. In the case of *Murdock* v. *Anderson*, 4 Jones' Eq., 77, this Court held that a receipt describing land, as "my house and lot, in the town of Hillsborough," was not a sufficient memorandum, under the statute of frauds, of an agreement to convey land, and was void because of the imperfect description. On the other hand, where the language used in the deed to point out the land was, "*my* house and lot, in the town of Jefferson, Ashe County, North Carolina," it was decided that testimony that the grantor had but one lot in that town was admissible and fitted the description to it, because the word "*my*," with such proof, made the description as definite as "the house and lot, on which I now live." *Carson* v. *Ray*, 7 Jones, 609. Any lot in a town can be located by metes and bounds by the map of the town in which it is situate. *Davidson* v. *Arledge*, 97 N. C., 172.

In *Wharton* v. *Eborn*, 88 N. C., 345, it was held that extrinsic testimony was competent to locate the land, because in addition to describing it, as in B Township, Beaufort County, adjoining the lands of T. and H., containing one hundred and fifty acres, it was decided to be "the same land conveyed by John W. Earle to said Rowland by deed, dated May 28th, 1868," thus adopting the more particular description in the last named deed. In *Brown* v. *Coble*, 76 N. C., 391, the description of the land as "that John Brown, ancestor of the petitioner, died seized of and *possessed* of a tract of land in said county of Guilford, on the waters of Stinking Quarter, adjoining the lands of ----," was held sufficiently definite, upon the principle stated in *Carson* v. *Ray*, *supra.* In *McGlawhorn* v. *Worthington*, 98 N. C., 199, where the deed purported to convey "all that tract of land, lying in the county of Pitt, and State of North Carolina, and *known as a part of the John Tripp land, adjoining the lands of B. W. and others*, containing one hundred acres," it was held competent to locate, by parol testimony, a tract of land known as a part of the John Tripp land, but the deed was held void for failure to offer any evidence sufficient to be submitted to the jury to so identify the land. This ruling was in accordance with the principle announced in *Farmer* v. *Batts*, 83 N. C, 387, which has been considered as marking the extreme limit to which the Courts would go in fitting ambiguous descriptions to land. There the language of the deed was, "containing one hundred and ninety-three acres more or less, it being *the interest in two shares*, adjoining the lands of James Barnes, Eli Robbins and others," was declared sufficiently definite to be susceptible of explanation by testimony, to show that there was a tract of land adjoining the lands of the parties named, and that *it was known as the one in which William Dixon* (who signed the receipt, relied on as the contract of sale,) *claimed two shares.* The phraseology pointed, in that case, beyond the proof that the land had been designated as that claimed by Dixon, to a partition proceeding, in which there was a possibility of showing a record of more certain designation of the boundaries. The case of *Edwards* v. *Bowden*, 99 N. C., 80, is also an extreme one, almost on the shadowy line between definite and void descriptions. The land, however, could be located with clearly defined boundaries by showing that fifty acres of the part of the original Gray Pridgen tract that was allotted or conveyed to Patrick Lynch and R. N. Bowden was situate on the east side of the road, described in the deed, detached from their other lands. The deed could not be held void upon its face, therefore, when its phraseology suggested the possibility of locating the land purporting to be conveyed by it by any such competent explanatory evidence.

It was not insisted on the argument that there was a fatal variance between the land declared for in the complaint and that embraced in the descriptive clause of the deed offered to show title. The complaint, as it appears in the transcript, substitutes the word "adjoining" for "bounded by." In *Allen* v. *Chambers*, *supra*, Chief Justice RUFFIN delivering the opinion, the language in the receipt, "a certain tract of land, lying on Flat River, including Taylor Hicks' spring-house and lot, adjoining the lands of Lewis, Davies, Womack and others," is declared too vague, because "it mentions no quantity nor how any land is to be laid off around the improvements of Hicks."

In *Harrell* v. *Butler*, 92 N. C., 20 (Justice ASHE delivering the opinion), the description declared too indefinite was, "all my interest in a piece of land adjoining the lands of J. J. Jordan, Joseph Keen and others." In *Hinchey* v. *Nichols*, 72 N. C., 66, the boundaries set forth in the grant were as follows: "A tract of land containing 173 acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses said branch that goes from Crane's to Sutton's, on a stake, running west 28 chains, 50 links, to a white oak in Miller's line; then north 60 chains to a stake; then east 28 chains, 50 links, to a stake; then south 60 chains to the beginning." The Court held that there was no possible way of identifying the land except by locating the white oak at the end of the first line, as the stakes were all imaginary points, unless located in the grant by distance from some fixed point or object.

In *Dickens* v. *Barnes, supra*, this Court held that the deed offered in evidence did not "constitute color of *title*," and possession under it was not adverse. The land was described as "one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres, more or less."

The case of *Hinton* v. *Roach* 94 N. C., 106, is obviously not only in direct conflict with *Allen* v. *Chambers, supra; Harrell* v. *Butler, supra; Grier* v. *Rhyne, supra*, and *Dickens* v. *Barnes, supra*, decided previously, but with the subsequent case of *McGlawhorn* v. *Worthington, supra*. There, the description was "a certain tract in N. township, adjoining the lands of H., S. and others, said to contain 37½ acres." To show that the opinion in that case (*Hinton* v. *Roach*) was inadvertent, not only because it is irreconcilable with previous and subsequent adjudications of this Court, but because it is not in accordance with the reasons by which the Court was guided in reaching its conclusions in many cases that we have cited, we reproduce the reasoning of the same learned Justice in *Howell* v *Butler*, where the descriptive clause was almost identical with that in *Hinton* v. *Roach*, the only difference being in favor of the sufficiency of the former, in that it pointed, by the use of the words "*my interest*," to the possibility of offering evidence admissible under the rule laid down in *Carson* v. *Ray* and *Farmer* v. *Batts*. The Court say (in *Harrell* v. *Butler*): "In *Kea* v. *Robeson*, 5 Ired. Eq , 373, it was held that when a deed fails to describe the subject matter of a conveyance so as to denote upon the face of the instrument what it is in particular, it is totally inoperative unless it contains a reference to something which renders it certain. The want of such a description in a deed is a defect which renders it totally defective. There is nothing on the face of this deed by which the land sought to be conveyed can be identified; nor is there any reference to anything which renders it certain. The fact *that it is described as adjoining the lands of J. J. Jordan, Joseph Keen and others cannot have that effect, for that description applies to one tract as well as another that adjoins those lands. It might, according to the description, lie as well on one side as the other of the lands belonging to those persons.*" The ruling seems to have originated in a misinterpretation of the reason on which the decision in *Farmer* v. *Batts* rested, in that unusual and unauthorized significance was given to the words "*and others*," whereas, in *McGlawhorn* v. *Worthington*, the Court placed the proper construction upon the principle announced in that case by holding that the testimony would have been competent if offered to show the location of a tract of land "known as a part of the John Tripp land." Nor does the fact that the supposed number of acres is given distinguish *Hinton* v. *Roach* from any of those cases where the holding of the Court is irreconcilable with the opinion in that case, except *Harrell* v. *Butler*.

The syllabus in *Kitchen* v. *Herring*, 7 Ired. Eq., 190, is misleading, for while the description given in the receipt was, "lying on the South side of Black River, adjoining lands of William Hofford and Martial," it is clear that Pridgen could be compelled by the Court to convey to Kitchen by invoking the aid of a principle very different from a declaration that the descriptive words in the receipt were sufficiently definite. The receipt was evidence that Kitchen paid the purchase-money for the land to Pridgen. It was admitted that Pridgen took a conveyance for Herring in January following to himself for the very land for which Kitchen had advanced the purchase-money. If this fact had not been admitted, it would have been competent for Kitchen to prove it, and thereby establish a parol trust and show his right to demand a conveyance from Pridgen, who bought with his money. There is, therefore, no difficulty in reconciling the conclusion in *Kitchen* v. *Herring* with the rule so clearly stated by the same Judge (PEARSON) in *McCormick* v. *Monroe*, *supra*.

The complaint may have been amended or incorrectly copied, and we will not, therefore, *ex mero motu*, dismiss the action, because we hold that the words, "adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres" (in paragraph five of the complaint), do not describe any land so definitely as to give the plaintiffs a standing in Court, nor on the ground that after the evidence was heard there was a fatal variance between the allegation and the proof. *Allen* v. *Chambers*, *supra*; *Tucker* v. *Baker*, 86 N. C., 1; *Knowles* v. *Railroad Co.*, 102 N. C., 62. The point was not made, as it might have been.

The fact that the Court has sustained several levies upon lands upon Justices' judgments where the description was such as has been held insufficient in deeds, may be reconciled with the rule we have laid down, when we remember that their validity was made to depend, not on the principles we have discussed (the common law requisites of a deed on the statute of frauds), but upon the construction of the law prescribing how levies should be made. Section 16, ch. 62, Revised Code, required the officer on his return on a Justice's judgment to set forth on the execution "what lands and tenements he has levied on, where situate, on what watercourse, and what land it adjoins." This Court held in *Ward* v. *Sanders*, 6 Ired. 382 (citing with approval *Smith* v. *Low*, 2 Ired., 457, and *Blanchard* v. *Blanchard*, 3 Ired., 105), that the levy would be sustained if the "description was equivalent to that prescribed" in the statute. In *Hilliard* v. *Phillips*, 81 N. C., 99, extrinsic testimony to fit the description given in the deed, which was the same as the levy, seems to have been admitted to identify the tract of land on which the defendant in execution lived. The language, "*the land of the defendant in the county of Chatham, on the waters of Tyson Creek*, adjoining the lands of Bryant Burroughs and others, containing two hundred acres more or less," seems to have been construed like "my lot in the town of Jefferson," in *Carson* v. *Ray*, to mean the land on which the defendant lived, and it was, therefore, held competent to show that he had but one tract of land, that on which he lived on Tyson Creek in Chatham County. In the extreme case of *Harrison* v. *Hahn*, 95 N. C., 28, a levy was held void because of uncertainty in the description

But it was insisted that one of the witnesses testified that the Snipes tract of one hundred and twenty-five acres (which belonged originally to John W. Blow) was completely surrounded and bounded by the lands of the persons named in the deed. Granting that to be true, we still encounter the insurmountable difficulty that there is nothing in the descriptive clause from which we can identify the particular fifty acres of that tract conveyed by the plaintiffs' deed. *Grier* v. *Rhyne*, 69 N. C., 346.

For the error pointed out the defendant is entitled to a new trial.

Error.

ETHERTON WILSON et al. v. HAYWOOD JOHNSON.

Deed—Description of Land.

Where two tracts of land were described in a Sheriff's deed as follows: "1st, a certain tract of land in aforesaid county, adjoining the lands of J. R. Conner and others, containing fifty acres, more or less; 2d, a certain tract of land in aforesaid county, adjoining the lands of J. B. Spivey and others, containing twenty-five acres, more or less": *Held*, that both descriptions were too vague and indefinite to be aided by parol proof.

(For a discussion of the principles governing this case, see *Blow* v. *Vaughan*, *ante.*)

This was a CIVIL ACTION for the recovery of land, tried at the Fall Term, 1889, of BERTIE Superior Court, before *Montgomery, J.*

To show title, the plaintiff offered in evidence a deed from E. R. Outlaw, Sheriff of Bertie County, to John Wilson and Etherton Wilson (the plaintiffs), which, after the usual recitations as to levy and sale under execution, contained only the following description of the land:

"1st. A certain tract of land in aforesaid county, adjoining the lands of J. R. Conner and others, containing fifty acres, more or less.

"2d. A certain tract of land in aforesaid county, adjoining the lands of J. B. Spivey and others, containing twenty-five acres, more or less."

The defendant objected to the introduction of this deed, which objection was overruled, and defendant excepted.

Subsequently the plaintiffs introduced one Ashbell, to show that the land described in the deed was the same described in the complaint, and to identify it. The defendant objected to the testimony on the ground that the description was too vague and indefinite to be aided by parol testimony. The Court allowed the witness to testify. The defendant excepted. Whereupon witness testified that he knew the land, and identified it as the same.

There was a verdict and judgment for plaintiffs, and the defendant appealed.

Mr. R. B. Peebles, for plaintiffs.

Messrs. Winston & Williams filed a brief for defendant.

Avery, J.—after stating the facts: It is conceded that the plaintiffs cannot recover unless they can show the boundaries and location of the land that the Sheriff's deed purports to convey.

We have held at this term, in *Blow* v. *Vaughan*, *ante*, that a description, substantially the same as that contained in said deed, was too vague and indefinite to be aided by parol proof, and it is unnecessary to reiterate the reasons that led us to that conclusion. There was error in the admission of the testimony to identify the land, and there must be a new trial.

Error.

WILLIAM ASHER v. CHARLES REIZENSTEIN, Administrator of A. HAHN et al.

Trover—Former Action—Jurisdiction.

1. An unsatisfied judgment in an action of claim and delivery is no bar to a subsequent action between the same parties for damages for the conversion of the property in controversy.
2. Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff in such action for damages for the conversion of the property: *Held*, that he was entitled to recover.
3. The Superior Court has jurisdiction of an action for damages for the conversion of property where the amount claimed is one hundred and twenty five dollars.

(DAVIS, J., dissented.)

CIVIL ACTION, tried at Spring Term, 1888, of CRAVEN Superior Court, before *Graves, J.*

This was an action to recover one hundred and twenty-five dollars damages for the alleged conversion of a horse. It was admitted that an action of claim and delivery had been instituted by A. Hahn, the intestate of the defendant, against the plaintiff in this action, for the horse in controversy, before a Justice of the Peace, and that the horse was delivered to the said Hahn, said Asher having filed no replevin bond in said action; that Asher, the defendant in said action obtained judgment, but no judgment was rendered against Hahn, or the sureties on his bond, for the value of the horse in case a delivery was not made.

On the trial of this action the plaintiff Asher offered to prove that after said judgment was rendered, and before this action was commenced, the said Hahn had disposed of the horse to a stranger.

His Honor having intimated an opinion that, upon the admission of the judgment before the Justice of the Peace, the plaintiff could not maintain this action, the plaintiff submitted to a nonsuit, and appealed.

Mr. W. W. Clark, for plaintiff.
Mr. Clement Manly, for defendants.

MERRIMON, C. J.: It is stated in the case settled on appeal that this action was brought to recover $125 "for the conversion of a horse." It is alleged in the complaint that the horse specified therein was the property and in the possession of the plaintiff; that "the defendants unlawfully took possession of said horse and converted him to their own use"; that he was "worth the sum of one hundred and twenty-five dollars," and judgment for the same is demanded as damages. The answer denies the material allegations of the complaint, and the defendant relies for defence upon the admitted facts that, in 1885, the present defendant brought his action in the Court of a Justice of the Peace against the present plaintiff to recover possession of the horse mentioned above, and availed himself of the provisional remedy of claim and delivery, by virtue of which the horse was delivered to the plaintiff in that action. It was adjudged therein that the horse was not the property of the plaintiff, but that of the defendant, the present plaintiff. There was no inquiry as to the value of the horse, nor judgment upon the undertaking for the return of the same in that action, &c., as prescribed and allowed by the statute (*The Code*, §§ 324, 431). No execution was issued upon such judgment.

On the trial the plaintiff offered to prove that after the judgment mentioned above, and before the commencement of this action, the defendant, "A. Hahn, had disposed of said horse to a stranger." The Court intimated the opinion that the plaintiff could not maintain this action. Thereupon, the plaintiff suffered a judgment of nonsuit, and, having excepted, appealed.

It does not appear with certainty, as it should do, what the proceedings were in the action before the Justice of the Peace. It seems that the Court gave judgment that the horse be returned to the defendant therein, the present plaintiff, without inquiry as to its value, and gave no judgment upon the undertaking given by the plaintiff in that action as required by the statute (*The Code*, §§ 324, 431). Regularly, such inquiry should be made and judgment given in favor of the party entitled to have the property in controversy, if he should demand it, but he might decline to ask for and waive his right to have such inquiry and judgment. The statute provides, as to recovery of personal property, that "judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery cannot be had, and the damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant *may be* for a return of the property, or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same." In the case referred to, the defendant was content to have judgment for the return of the property. The judgment given was final, and, so far as appears, the Court could not take any further steps in the action, unless simply to grant execution; it could not re-open the case, make inquiry as to the value of the horse, and give judgment for damages, and do other things that might have been done in apt time, observing proper methods.

It seems that the Court below founded its opinion on the supposed ground that the present plaintiff could have had adequate remedy in the action before the Justice of the Peace, and, therefore, he cannot maintain this action. If he could have had such remedy, then the conclusion would be correct. A party cannot maintain an action when he might have the same remedy in a pending action to which he is a party, if he is bound to assert his remedy there. But we are of opinion that the plaintiff was not bound to seek his remedy in the action referred to, because—first, it was ended, there was a final judgment in it; secondly, that was an action to recover *possession* of the property in which the defendant therein (the present plaintiff) could have only such remedy as allowed in such an action; thirdly, the cause of action alleged in this action is different in its nature, and the purpose of the action is different from that to recover possession of the property; and fourthly, the cause of action now alleged arose after the judgment in the former action. The cause of action alleged in this action is the *tortious conversion* of the plaintiff's horse, and he demands judgment for damages occasioned thereby.

This case is, in several respects, very like *Woody* v. *Jordan*, 69 N. C., 189, in which the Court held that a judgment in an action brought to recover certain personal property, specifically, is no bar to a subsequent action between the same parties seeking to recover damages for the taking and conversion of such property. In that case, as in this, it was contended, among other things, that the plaintiff's remedy was in the former action. The Court said that, "as to the first view, a mere inspection of this record is sufficient to show that, as a matter of fact, the judgment did not decide upon the present cause of action. In this action, the thing claimed is damages for the taking and conversion of the property, whereas in that the judgment was only for the taking and detention." The distinction thus pointed out is applicable here. Even if the present plaintiff might have pleaded a *counter-claim* in the former action as to the present cause of action, he was not bound to do so. As to it, he might ordinarily bring his own independent action. *Woody* v. *Jordan, supra; Francis* v. *Edwards*, 77 N. C., 271; *McClenahan* v. *Cotten*, 83 N. C., 332; *Gregory* v. *Hobbs*, 93 N. C., 1; *Kramer* v. *Electric Light Co.*, 95 N. C., 277.

It was contended on the argument here that the complaint shows upon its face that the plaintiff intends *to waive the tortious conversion* and sue for the price realized by the defendant for the horse; that, in that case, the Court of a Justice of the Peace would have exclusive original jurisdiction, and, therefore, this action must be dismissed. This contention is unfounded. The complaint alleges a conversion of the property, and demands judgment for damages. It is not alleged that the defendant sold the horse and realized one hundred and twenty-five dollars for him. It is simply alleged that he is worth that sum, and, in effect, that it was the measure—the amount of damages claimed *Bullinger* v. *Marshall*, 70 N. C., 520; *Wall* v. *Williams*, 91 N. C., 477.

There is error. The judgment of *nonsuit* must be set aside and the case disposed of according to law.

Judgment reversed.

WILLIAM A. CHEATHAM v. ISHAM C. ROWLAND.

Arbitration and Award—Pleading—Evidence.

1. An award duly made upon an arbitration, and performed, constitutes a good plea in bar to a subsequent action for the same cause.
2. Where the defendant pleads in bar of an action that the whole cause of action alleged in the complaint has been the subject of arbitration, and the award performed, and also alleges in his answer that he never had notice of plaintiff's claim until after the arbitration: *Held*, that the answer did not admit that the plaintiff's claim had not been submitted to the arbitrators, and that it was competent for defendant to prove that it had been considered and was embraced in the award.

CIVIL ACTION, tried at Fall Term, 1889, of VANCE Superior Court, before *Armfield, J.*

This action was brought to recover of the defendant one-fourth of the net proceeds of sales of lumber sawed by plaintiff and the firm of Cheatham & Rowland at their saw-mill between February 27, 1883, and January 1, 1884, said saw-mill being then owned one-half by plaintiff, and the other half by the defendant and A. F. Cheatham, then partners as the firm of Cheatham & Rowland. The amount alleged to be due was $450, with 8 per cent. interest from January 1, 1884, till paid; also for one-half of the proceeds of sale of a house at said mill sold by defendant January 25, 1884, for $30 Plaintiff further claims that the said firm of Cheatham & Rowland dissolved on January 1, 1884, and that on November 23, 1886, partition was made between the members of said firm of the partnership real estate, and that on said last named date, the defendant and said A. F. Cheatham executed a deed in trust on their several shares of the partnership real estate, then divided, to secure and pay their proportionate parts (one-half each) of any debt then owing by the said late firm of Cheatham & Rowland, whether to plaintiff or any other person. This deed is dated November 23, 1886, and was recorded the same day, and is made a part of the complaint.

The defendant answered, admitting the partnership, but denying the debt, and set up as a bar to the action an arbitration and award and the plea of the three-years' statute of limitations.

Plaintiff replied that the subject-matter of this action was not considered nor passed upon by said arbitrators, and that the deed in trust made a part of the complaint was executed by defendant at, and immediately after, the payment to plaintiff by defendant of the amount awarded to him by said arbitrators to secure the payment to plaintiff and defendant of any and all sums that were still unsettled between them arising prior to said date, November 22, 1886. As to the plea of the statute of limitations, plaintiff replied that the defendant agreed to pay said debt within three years, as appears by the terms and conditions of said deed in trust, and insisted that plaintiff and defendant, being tenants in common of said saw-mill, the statute would not begin to run until after a demand, no demand having been made till September 6, 1888.

His Honor submitted to the jury the following issues, stating that the burden was on defendant, and that if they were found in plaintiff's favor there must be a reference to state the account:

"Has there been an arbitration and award covering the subject-matter of this action or any part of it, and if any part of it, what part?

"Is the plaintiff's cause of action, or any part of it, barred by the statute of limitations, and if any part, what part?"

The defendant introduced the agreement to arbitrate, and the award of the arbitrators, and then introduced Col. T. L. Jones, one of the arbitrators, who stated that all matters between Cheatham & Rowland, and William A Cheatham, under the agreement to arbitrate, had been passed upon by said arbitrators, and that both plaintiff and defendant were allowed time to produce all claims they might have, one against the other, and that copies of the award were delivered to each of the parties.

Plaintiff objected to this testimony. because, as he insisted, it was admitted in the answer that this claim was not submitted to nor passed upon by said arbitrators, and was never presented to defendant till September 6, 1888.

His Honor overruled the objection. Plaintiff excepted.

Defendant introduced a receipt from plaintiff to defendant, showing payment of certain sums.

Thereupon, his Honor intimated that upon the evidence submitted, he should instruct the jury to find the first issue in the affirmative. The plaintiff, in deference to his Honor's opinion, took a nonsuit and appealed.

Mr. T. T. Hicks filed a brief for the plaintiff.

No Counsel for the defendant.

MERRIMON, C. J.: The very purpose of arbitration and award is to settle, conclude and put an end to disputes, controversies and litigations as to matters and things constituting a cause or causes of action embraced by the agreement to submit them to arbitration. Hence, an award duly made, performed and observed, constitutes a good plea in bar of any subsequent action for the same cause. The law favors such amicable method of adjustment of controversies and will uphold and enforce, by proper means and methods, agreements to arbitrate, and awards when so made. *Patton* v. *Baird*, 7 Ired. Eq., 255; *Osborne* v. *Calvert*, 83 N. C., 365; 2 Greenleaf on Ev., sec. 69; Kyd on Awards, 381.

In this case the defendant, in his answer, pleads in bar of the action that the whole cause of action alleged in the complaint was, by the parties before the action began, made the subject of arbitration; that the arbitrators selected duly considered the subject so submitted to them, and made their award in such respect, which the defendant observed and performed. It was not objected on the trial that the agreement to arbitrate or that the award was in any respect insufficient, or that it was incompetent to show, by proper evidence, that the cause of action was considered by the arbitrators and embraced by the award, but it was contended that "it was *admitted in the answer* that the claim was not submitted to or passed upon by the said arbitrators, and was never presented to defendant till September 6th, 1888." It was insisted that such admission was conclusive upon the defendant, and the Court should not have received evidence to the contrary. If it be granted that this might be so, it is clear that the defendant did not, and did not intend to, make such admission in his answer. So much of the answer as constituted his plea in bar, alleged directly the contrary. What the plaintiff relies upon as such admission, is the simple statement that after the arbitration he had no notice of the plaintiff's claim, as made in opposition to the award, until the time mentioned. This seems to us to be the plain meaning of what is said in the answer, taken in connection with the plea in bar. The language used is: "He further charges that although there had been a settlement of these matters (referring to the arbitration and award), and that plaintiff was given time by the arbitrators to bring in all claims of every description he had against defendant before them, defendant never had any notice whatever of such claim until;" &c. The supposed admission was inconsistent with the express allegations of the plea.

The agreement to arbitrate was broad and comprehensive, and it was not contended that it did not embrace the cause of action alleged in the complaint. It was competent for the defendant to prove that it was considered by the arbitrators and was embraced by the award. *Osborn* v. *Calvert*, *supra; Brown* v. *Brown*, 4 Jones, 123; *Walker* v. *Walker*, 1 Winst., 258. The evidence produced went directly to so prove, and there was no evidence to the contrary. The Court was fully warranted in saying that it would instruct the jury to find the first issue in the affirmative.

If the plaintiff intended to make one or more breaches of covenant contained in the deed of trust on the part of the defendant a cause or causes of action in this action, he should have so alleged in his complaint. No such cause of action is alleged; the deed of trust is unnecessarily and improperly referred to, and the reference to it is merely redundant matter.

Affirmed.

THOMPSON PROCTOR, Adm'r, v. W. H. PROCTOR.

Petition to Make Real Assets—Plea of Statute of Limitations by Heir.

1. In a proceeding by an administrator to sell the lands of his intestate to make assets, the heir can plead the statute of limitations to such claims of creditors as have not been reduced to judgment against the administrator. The heir is bound by such judgment, unless he can show that it was obtained by collusive fraud.

2. Where in such proceeding the defendant (heir) pleaded that "if there is any indebtedness outstanding against the estate of plaintiff's intestate, the same is barred by the statute of limitations" (*The Code*, § 153, par. 2), "and the said statute of limitations is hereby pleaded against the collection of said claims: *Held*, that although the plea is indefinite and unsatisfactory, it was the duty of the Court below to have considered and determined it, and a failure to do so is error.

PETITION to make real estate assets, tried before *Graves, J.*, at Spring Term, 1889, of EDGECOMBE Superior Court, upon appeal from the Clerk.

It appears that L. D. Proctor died intestate in 1877, and that on the first of May, 1878, the plaintiff was appointed administrator of his estate, and he brings this special proceeding to obtain a license to sell lands of his intestate to make assets to pay the debts of the latter. The defendant appellant, one of the heirs at law of the intestate, in his answer to the petition, denies that the personal assets that have come and ought to have come into the hands of the plaintiff are insufficient to pay the debts of his intestate, and he pleads specially, "that if there is any indebtedness outstanding against the estate of plaintiff's intestate, that the same is barred by the statute of limitations (*The Code*, §§ 153, par. 2, 155 and § 1427), and the said statute of limitations is hereby pleaded against the collection of said claims."

It seems also that the appellant intended to plead, and was treated as pleading, perhaps before the referee. any statute of limitation applicable to such debts, whether notes, single bonds or judgments, as were preferred against the administrator, whether the latter pleaded such statute or not, and as to debts admitted by him, as to which he did not plead such statute, although he might have done so successfully, but allowed judgments to go against him.

One debt presented against the administrator was the single bond of his intestate, made to P. G. Foster for $78.62, dated and due the 1st of September, 1855, and there were other like bonds—one made in 1870 The plaintiff did not plead the statute of limitation or payment against any of these debts, but suffered judgment to go against him in the Court of a Justice of the Peace. In the course of the special proceeding, there was an order of reference directing an account to be taken and stated, and, before the referee, the appellant insisted that the debts above referred to were barred by the statute of limitations, or, under the statute of presumption, they were presumed to be paid. One of the judgments referred to above was given after this special proceeding began, and after the appellant had filed his answer to the petition. The referee took evidence, found the facts and law, stated an account and made his report of the whole to the Court. The appellant filed numerous exceptions to the findings of fact and law by the referee, which the Court overruled and gave judgment in favor of the plaintiff, from which the complaining defendant appealed.

Mr. John L. Bridgers, for plaintiff.

Mr. G. M. T. Fountain (*Messrs. Norfleet & Staton* filed a brief), for defendant.

MERRIMON, C. J.—after stating the facts: It is expressly decided that the heir may plead the statute of limitations against a debt of the ancestor not reduced to judgment against the administrator in a special proceeding of the latter to obtain a license to sell the descended lands to make assets to pay debts of the intestate. *Bevers* v. *Park*, 88 N. C., 456. In that case, it was left an open question, "How far the heir may be bound by a valid subsisting judgment against the administrator, or to what extent he may contest the validity of the demand upon which it is founded." The question thus left open was considered and settled in *Speer* v. *James*, 94 N. C., 417. In this case, *Bevers* v. *Park, supra*, is referred to and commented upon, not disapprovingly, but the Court declined to enlarge its scope so as to allow the heir to plead the statute of limitations against a debt upon which the administrator had, in good faith, allowed a judgment to go against him. It is there held that the heir is bound by the judgment against the administrator, unless he can show that it was obtained by collusion and fraud, and he is barred by it from setting up any statutory limitation or other matter which might have been pleaded by the administrator as a bar to the action against him.

The findings of fact by the Court negative the allegation of the appellant, in his answer, that the judgments referred to were obtained by collusive fraud. He could not, therefore, avail himself of the statute of limitations that the plaintiff might have pleaded against the notes upon which such judgments were founded. It appears that the note on which judgment was given against the plaintiff after this special proceeding began was not barred by the statute. Hence, it is not necessary to inquire whether the appellant's plea of the statute of limitation as to it had reference to the beginning of the proceeding, or to the filing of his answer, or the time of taking it into the account by the referee. Such inquiry is not material here. The Court, therefore, decided properly that the appellant could not avail himself of the plea of the statute of limitations against the notes on which the judgments were founded, as the plaintiff might have done.

It is alleged in the answer that the plaintiff, who is one of the heirs of his intestate, entered into an agreement with the defendants, the other heirs, whereby he obliged himself to live upon and take the rents of the land, support the surviving widow of the intestate, and pay the debts of the latter, and that he had received rents sufficient to pay the debts, &c. Such agreement can have no application or force here. The estate must be administered according to law. The creditors are entitled to have their debts paid without reference to and unaffected by agreements, whether for convenience or otherwise, between and among the next of kin and heirs. The plaintiff in this proceeding is only chargeable with such rents as he received, or ought to have received, as administrator.

The plea of the statute of limitations in the appellant's answer is not simply informal, it is indefinite and unsatisfactory as a pleading. The purpose seems to be to plead, with appropriate averments, that the plaintiff in this special proceeding represents, sues for and in behalf of certain creditors of his intestate, who was the appellant's ancestor; that he is the heir and real representative of his said ancestor; that such creditors, so suing through and by the plaintiff, have not brought this special proceeding against the appellant as such real representative, within seven years next after the qualification of the plaintiff as such administrator. The plea, if sufficiently pleaded, raises a very important question upon the statute (*The Code*, § 152, par 2). It may be that it should be treated as sufficient for the purpose contemplated by it. But it is not proper to decide now that it is or is not sufficient, because the question is not now before us. Strangely, the Court below, so far as appears, did not consider or pass upon the merits of this plea, although it seems the appellant insisted that it should do so. The Court may have been of opinion that the appellant could not avail himself of such a plea, that it was impertinent, or it may have been confounded with the like plea as to the particular claims preferred against the administrator; but, nevertheless, it should have taken notice of and disposed of it by proper adjudication.

This plea presupposes that the statute just cited bars the right of the plaintiff to maintain this special proceeding against the appellant for the benefit of creditors, because it was not brought within seven years next after the qualification of the plaintiff as administrator. As invoked, it does not have reference to the particular claims preferred against the administrator. The appellant's counsel insisted in his brief that this Court should take notice of the plea and decide upon its pertinency and sufficiency. We cannot do so, because the facts as to whether or not the advertisement required by law for creditors to present their claims to the administrator was duly made are not found. This is material. There is some evidence in this respect, but the referee did not find the facts, nor did the Court. *Love* v. *Ingram*, 104 N. C., 600.

An action is not tried and disposed of until its whole merits, as presented by the pleadings, are considered and determined by the judgment of the Court. All the issues of fact should be tried in some way authorized by law, and the law applied upon the facts admitted by the pleadings and as found. Otherwise, there is error. Every material party has a right to have the action determined upon the whole merits, unless, in some respect or in some way, he has abandoned or waived such right, and this should appear by the record. There is error. To the end that further proceedings may be had in the Court below, in accordance with this opinion, let the same be certified to that Court. It is so ordered.

Error.

*D. L. GORE v. D. L. TOWNSEND.

Mortgage—Application of Funds—Husband and Wife—Dower.

1. Where a wife joined her husband in a mortgage conveying his land, together with personal property belonging to him, to secure his debt, and afterwards the husband alone executed a second mortgage conveying the same and other personal property to secure a second note executed by him, and before the personal property was sold directed that the proceeds of sale of the personal property, except so much as should arise from the sale of a mule and wagon (about which there was no direction), should be applied to the payment of the debt secured by the second mortgage: *Held*, that the fund arising from the sale of the mule and wagon should be paid upon the debt secured by the first mortgage, in exoneration of the wife's inchoate dower interest.
2. The mortgagee cannot, because the husband failed to direct the application of the fund arising from the sale of the mule and wagon, apply it in discharge of the debt secured by the second mortgage, but must pay it on that secured by the first mortgage, for which the property is primarily liable, and in exoneration of the wife's dower.
3. The inchoate right of the wife to dower in her husband's land, under *The Code*, ch. 53, has a present value as property depending on the ages, health and habits of both, and other circumstances competent to show the probabilities as to the length of life of each, and when she encumbers it by joining in a mortgage of his land to secure his debt she becomes his surety.

This was a CIVIL ACTION, tried before *Shipp, J.*, at the Fall Term, 1889, of ROBESON Superior Court, and was brought to foreclose a mortgage set out in the pleadings.

The mortgage was executed to secure a note for $750, dated 19th of March, 1884, and was made the same day, and in addition to the land conveyed therein, which was the individual property of D. L. Townsend, two mules and one wagon were also mortgaged therein to secure said debt, which was the individual debt of said Townsend; one of the mules died subsequently. The land was acquired by D. L. Townsend in 1884, and he intermarried with *feme* defendant in 1875, and they were then, and have been ever since, citizens and residents of this State, and that it is the land on which they were living at the time they executed the mortgage, and on which they are now living, and that neither of said defendants own any other land in the State of North Carolina.

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* Head-notes by AVERY, J.

On the 12th of March, 1887, D. L. Townsend, to secure further advances from plaintiff, executed his note for $1,119.10, due on the first day of January, 1888, and secured same by a mortgage on personal property therein set out, of even date with the note, in which was included the mule and wagon also conveyed in first mortgage. About January 1st, 1888, it was mutually agreed between plaintiff and defendant D. L. Townsend that all the property conveyed in the second mortgage, dated 12th of March, 1887, should be surrendered to plaintiff, and on a sale thereof on the best terms possible the proceeds, except mule and wagon, were to be credited on note and mortgage, dated 12th of March, 1887, the defendant, D. L. Townsend, however, not giving any directions as to how the proceeds of the sale of the mule and wagon above referred to, conveyed in both mortgages, were to be applied. This property, including the mule and wagon, was sold, and the proceeds of sale of mule and wagon, amounting to $114.10, were applied by D. L. Gore to the note and mortgage dated March 12th, 1887. The mule and wagon were the property of D. L. Townsend at the time of the execution of both mortgages. The *feme* defendant joined with her husband in the execution of the mortgage of 1884, and her privy examination was regularly taken. There was a verdict in response to the issues submitted to the jury as to the value of the land, as appears in the record. Upon these facts, a trial by jury being waived, except as to the value of the land, his Honor was of the opinion that the *feme* defendant having joined in the execution of the mortgage conveying her husband's land, became a surety to the debt, and the proceeds of the sale of the mule and wagon, amounting to $144.10, should be applied as of January 1st, 1888, the time of sale, to the note and mortgage of March 19th, 1884, and so adjudged, and the plaintiff excepted. Judgment. Plaintiff appealed.

Messrs. T. A. McNeill and *S. C. Weill*, for plaintiff.
Mr. W. F. French, for defendant.

AVERY, J.—after stating the facts: "In all cases where the wife executes a mortgage on her property for her husband's debts, or for money loaned to him, it is well settled that she occcupies the position of, and is entitled to all the rights and privileges of surety for her husband." Kelly, Contracts of Married Women, p. 105. "She assumes, in the eye of a Court of Equity, the character of a surety for the husband. Properly speaking, she is not a surety, but she is so called by analogy. She has a title to call upon her husband to exonerate her estate from the debt." 1 Bish. Married Women, §604; *Purvis* v. *Carstaphan*, 73 N. C., 575.

It is true that the inchoate right of dower was never considered an estate of interest in a court of law, which did not even concede the power of the widow to convey her unassigned dower after the right had become consummate by the husband's death, but she might make a contract for the sale that would be enforced in a Court of Equity. *Potter* v. *Everett*, 7 Ired. Eq., 152; *Boyles* v. *Commissioners*, 40 Pa. St., 37. It must be remembered, however, that the discussion of the nature of the wife's interest in her husband's land has assumed a new phase since the enactment of the law restoring the common law right of dower in North Carolina.

In *Gwathmey* v. *Pearce*, 74 N. C., 399, Justice READE, after citing *Purvis* v. *Carstaphan*, as establishing the doctrine that the wife, when she joins her husband in a mortgage of her separate property to secure his debt, sustains the relation of his surety in that transaction, says, in reference to the former case: "Here the wife joined her husband in the conveyance of his land to pay his debt, in which land she had, *under our dower statute, a vested right to dower, to be allotted after her husband's death*, and she joined in the deed for the purpose of binding her dower. After her husband's death the whole land, her dower included, was sold under the trust deed to pay the debt. *This made the wife a creditor of her husband's estate*, to the amount of the value of her dower in the land."

The dower statute referred to by the Court was the Act of 1868–'69, ch. 93, §§ 32 to 37, and was substantially the same as §§ 2102, 2104, 2106 and 2107 of *The Code*, and, therefore, if the inchoate right to dower was a "vested right," then it is of equal dignity and importance now, and the mortgage in which the defendant's wife joined in the present case passed an interest that imparted additional present value to the mortgagee's security in proportion to the worth of her life estate in one-third of the land estimated according to the life tables or certainly to a sum that an expert could ascertain, having as data for his calculation the value of the land and the chances of survivorship on her part after the husband's death. Although in *Gwathmey* v. *Pearce*, *supra*, the wife was declared a creditor of the husband's estate after his death to the value of her dower, the ruling could have been sustained only on the principle upon which it is explicitly made to rest that the wife was a surety, and she did not sustain that relation to the original contract because her husband died, but because she signed a deed that subjected her interest in the land conveyed. It would seem, therefore, that this Court has settled the principle that the wife, by joining in a mortgage of the husband's land to secure his debt, becomes then a surety, and in case she survive him, and the land is sold to satisfy the debt, she becomes also a creditor to the value of the life estate. The language of §§2106 and 2107 of *The Code* seems to recognize the right during the husband's life as a valuable interest that may pass by a conveyance rather than a naked right that the claimant may be barred by the estoppel of her deed from enforcing, and this interpretation follows in the line of more modern legislation in making every valuable interest transferable and convertible into money, while it is in accord with the older idea that the claim of the wife to dower is favored by the law.

While there is conflict of opinion as to the nature and qualities of the wife's inchoate interest, there is much authority that, either directly or indirectly, sustains the view advanced by this Court, apart from any peculiarity in the language of our statute, and it is also strongly supported by analogy. The right of exoneration in equity grows out of the suretyship, and must exist so soon as the interest conveyed is about to be subjected to sale, and it appears that there is a fund or property belonging to the principal debtor, equally liable with such interest for the debt. The contract of suretyship, or the conveyance of one's property to secure the debt of another, is a transaction primarily between, not the principal and the surety, but the surety and the third person. 2 Bishop, M. W., § 370. In *Bullorld* v. *Briggs*, 7 Pick. (Mass.), 533, it was held that the relinquishment of the right of dower was a valid consideration for the conveyance of the equity of redemption, even as against the claim of creditors; and PARKER, Chief Justice, in discussing the nature of the wife's interest during the husband's life, says: "The consideration for this intended settlement on the wife was her right of dower in the estate, which the husband was about to mortgage. Without her relinquishment, he could not raise the money wanted for his support and his debts. His days were numbered by intemperance and disease. Though she had no actual estate in the dower during the life of the husband, yet she had an interest and a right of which she could not be divested but by her consent, or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain. It is an interest which the law recognizes as the subject of conveyance by fine in England, and by deed with us." In *Vartie* v. *Underwood*, 18 Barb. (N. Y.), 561, the Court held that "the wife's inchoate right in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her with her husband, and will be protected against the claims of the husband's creditors by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors during the joint lives of husband and wife." See also *Denton* v. *Nowny*, 8 Barb., 618. In the latter case of *Wedge* v. *Moore*, 6 Cush., 8, Chief Justice SHAW, delivering the opinion of the Court, it was held that, where the husband executed three mortgages upon his land, his wife joining only in the second one, she was entitled, after his death, to dower against the third mortgagee, who had paid the debts secured by the two first mortgages. In the case of *Kelly* v. *Harrison*, 2 Johnson, 29, the Court held that a wife who remained a subject of Great Britain, while her husband took part with the Colonies in the Revolution, was entitled to dower, after the death of the husband, in all land acquired by the husband up to the beginning of the war. KENT, J., says: "But the right could not attach till the land was purchased, and I distinguish between the capacity to acquire and the vested right. The Revolution took away the one and did not impair the other."

Scribner (in his work on Dower, vol. 2, page 8) says: "Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor, indeed, a vested interest therein, and, notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such." It has many of the incidents of property. It has a present value that can be computed. *Jackson* v. *Edwards*, 7 Paige (N. Y.), 386 and 408; *Buzick* v. *Burzick*, 42 Iowa, 259; Scribner, 519; *Stoppelbein* v. *Schultz*, 1 Hill (S. C.), 130. It is a valuable consideration for a conveyance to the wife. *Bullard* v. *Briggs*, *supra*; *Reid* v. *Hoist*, 55 Md. The wife may maintain an action for its protection. *Petty* v. *Petty*, 4 B. Mon. (Ky.), 215; *Burns* v. *Lynde*, 6 Allen (Mass.), 305; *Simon* v. *Canady*, 53 N. Y., 298; *Russell* v. *Taylor*, 41 Mich., 702; *Benoist* v. *Merruin*, 17 Mo., 537. She may file a bill or bring an action for the redemption of a mortgage covering it. *Davis* v. *Witherill*, 13 Allen (Mass.), 60. It has been repeatedly declared by the Courts an incumbrance within the meaning of the usual covenant in a deed. *Hill* v. *Ressigien*, 17 Barb. (N. Y.), 162; *Shearer* v. *Ronger*, 22 Pick (Mass.), 447.

The right of dower is favored by the law, and apart from the idea of suretyship a widow may maintain an action for dower in equity, and may demand that a lien upon the land be discharged out of the personal estate, or that a portion of a tract of land shall be sold to relieve the dower of the lien of a mortgage, or an equitable estate of the lien for the purchase-money. 1 Scribner, 521. It is true that it was held in *Jenness* v. *Cutlar*, 12 Kansas, 500, that where the wife joined the husband in a mortgage deed conveying his land, and waiving the homestead right, she was not a surety, but the ruling rested upon the undefined nature of the homestead right. It was not only not an estate, but not a right peculiar to the wife. Brent on Suretyship, § 22.

It must be recollected that the restoration of the common law right of dower by our statute worked a change in the nature of the wife's present interest in her husband's lands. It is no longer subject to the double contingency of survivorship and failure by the husband to alienate before death, but only to the former, and if he venture to sell without the joinder of the wife, a prudent purchaser, in fixing the price, will deduct from the actual value such sum as, looking to the ages of husband and wife, their habits, &c., he estimates the chances of the wife's dower to be worth. Hence, this Court in holding, in the case of *Gwathmey* v. *Pearce*, *supra*, that the widow was a creditor after the death of the husband to the extent of the value of the land mortgaged, because she had become his surety when she encumbered her inchoate right of dower, assigned as a reason that the then recent changes in the law had made her interest a "vested right," and imparted to it a value even during the life of the husband.

We concur with the Court below in the opinion that the wife was a surety, and the proceeds of the sale of the mule and wagon should have been applied to the payment of the debt secured by the first mortgage in exoneration of the land in which she had a valuable interest. Her right to exoneration could not be defeated by the failure of the husband to direct the application of the proceeds of the sale of the mule and wagon, which was primarily liable under the first mortgage in exoneration of the land.

The inchoate right of the wife to dower in her husband's land has a present value, as property, depending on the ages of both, their health, habits, and other circumstances tending to show the probabilities as to the length of the life of each, and where she encumbers it by joining in a mortgage of his land to secure his debt she becomes his surety. Her right to exoneration could not be defeated by the failure of the husband to direct the application of the proceeds of the sale of the mule and wagon, that fund being primarily liable under the first mortgage.

Error.

*J. H. BOBBITT v. J. R. RODWELL.

Evidence—Fraudulent Conveyance—Assignment.

1. Where it is manifest upon reading the instrument alleged to be fraudulent, that though it was apparently executed with fraudulent intent, still some explanation might be given and a different purpose shown by evidence *aliunde*, the case belongs to the class that must be submitted to the jury to determine whether the presumption of fraud is rebutted; but where the facts set forth in the case agreed and apparent from reading the deed of assignment are not sufficient to raise a presumption of fraud, if the intent is not found as a part of the case agreed, then all of the circumstances should be left to the jury, without instruction as to their weight, to determine whether the fraud was proven to their satisfaction.
2. Where a deed of trust contains no provision as to the terms of sale, or allows the trustee to sell on credit generally, without providing for unreasonable delay or specifying the length of credit to be given, it is not fraudulent in law, nor is there a presumption of fraud for that reason, but such general power to give credit is perfectly consistent with good faith, and falls so far short of raising a presumption of fraud, that it cannot be considered as even a badge of fraud.

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*Head-notes by AVERY, J.

3. The fact that a debtor, in a deed of assignment, reserves to himself the personal property exemption allowed him by the Constitution and laws of the State, does not affect the validity of the deed, and is no evidence of a fraudulent intent. It is not necessary, in this case, to decide whether the reservation in the deed of five hundred dollars of the money arising from the sale of property by the assignee would raise a presumption of fraudulent intent, and make, under the deed, as held by the Court below, fraudulent *per se*.

This was a CIVIL ACTION, heard upon a case agreed, a trial by jury having been waived, at the September Term, 1889, of the Superior Court of WARREN County, before *Boykin, J.*

His Honor held that the deed in trust was fraudulent and void, and gave judgment as follows:

"This cause having been heard upon the facts agreed upon and filed, and upon the deed of trust mentioned and described in the complaint and embraced in the case agreed, a jury having been waived by the parties, it is considered by the Court that the plaintiff take nothing by his said suit, that the defendants go without day, and that they recover against the plaintiff their costs of suit.

CASE AGREED.

This case coming on for hearing by the Court, a jury having been waived by the parties, the following facts are agreed upon:

1. The execution of the deed of trust, as set forth in the complaint, and is made a part of the case agreed.

2 That the trustee is and was insolvent at the time of the execution of the deed of trust.

3. The debtor purchased $650 worth of goods in fall before the assignment.

4. The inventoried value of the goods levied on by the Sheriff was $115, and the same brought at Sheriff's sale at public auction fifty dollars.

5. The goods levied upon by the Sheriff were the remnant of debtor's stock, after his selection of the choicest and most saleable goods as exemptions.

If, upon the foregoing facts, the Court shall be of opinion that the plaintiff is entitled to recover, then judgment shall be rendered accordingly; otherwise, for the defendant.

EXHIBIT—DEED OF TRUST.

WHEREAS, J. A. Nicholson, of the county and State aforesaid. is justly indebted to J. H. Bobbitt, of the county of Warren and State of North Carolina, by reason of one note of $85, dated August 1, and due, respectively, December 1; and whereas, he is indebted to divers other parties for goods, wares and merchandise; and whereas, he is desirous of securing all of his indebtedness, as far as his means will afford:

Now, therefore, this indenture witnesses, that the said J. A. Nicholson, for and in consideration of the premises, and the further consideration of the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, hath bargained, sold and conveyed, and by these presents do bargain, sell and convey unto J. H. Bobbitt, his heirs, administrators and assigns, the following described property, to-wit: His entire stock of dry goods, notions, tracts, shoes, hardware and merchandise of every description, and store furniture in his store at Macon, N. C.; also, all his bonds, notes, accounts, and other evidences of debt belonging to him, first reserving therefrom the sum of $500, being the personal property exemption exempted and allowed by the Constitution and the laws of North Carolina to him:

To have and to hold to him, his executors, administrators and assigns, upon the following uses and trusts, forever: That the said J. H. Bobbitt shall have full power and authority, and he is fully empowered to take possession of the above described property, and sell the same at public auction, or by private sale, for cash, or on credit, as he may deem best for the interests of the creditors, and to collect all the debts due to the said J. A. Nicholson, by suit or otherwise, and out of the proceeds he is first to pay over to the said J. A. Nicholson, for his personal property exemption, the sum of $500, as allowed by the Constitution and laws of North Carolina aforesaid; and, secondly, he is to receive a reasonable compensation for his services and expenses in executing this trust; and, thirdly, he is to pay off the amount due to the said J. H. Bobbitt by reason of the note aforesaid, and then he is to pay the balance of proceeds, *pro rata*, among all of his other creditors, and if there shall be any surplus, he is to pay it to the said J. A. Nicholson.

In witness whereof, said J. A. Nicholson hath hereunto affixed his hand and seal, this the 28th day of November, 1888. J. A. Nicholson. [Seal]

Test: B G. Riggan.

COMPLAINT.

The plaintiff above named, complaining of the defendant, alleges—

1. That heretofore, to-wit, on the ---- day of ------, one Augustus Wright was doing, and is still doing, a general mercantile business in the city of Petersburg, Va.

2. That during the year 1888, J. A. Nicholson, above named, was doing a mercantile business in the village of Macon, Warren County, North Carolina, and purchased of the said Augustus Wright certain merchandise, amounting to the sum of about three hundred dollars.

3. That on the 28th day of November, 1888, the said J. A. Nicholson made an assignment, for the benefit of his creditors, to the said J. H. Bobbitt; that the said Bobbitt as said trustee accepted said trust, took possession of the goods, wares, merchandise and property of every description conveyed by said assignment deed.

4. That on the ---- day of ------, 1888, Augustus Wright aforesaid, having obtained judgment against the said J. A. Nicholson for the aforesaid sum, to-wit, about three hundred dollars, proceeded to collect the same from said trustee by process of law in the following manner, to-wit: by obtaining executions, putting them into the hands of the Sheriff aforesaid, and filing with him a bond in the sum of fourteen hundred dollars to idemnify him against all loss and damages which might arise from his selling under said executions, a copy of which bond is hereto annexed, and prayed to be made a part of this complaint.

5. That after receiving said executions and said bond, the said Sheriff had the personal property exemptions of said J. A. Nicholson duly allotted out of the goods conveyed to said trustee. After the said personal property exemptions were allotted as aforesaid, there was an excess of said goods, wares and merchandise so conveyed by said trust deed, of the value of one hundred and fifty dollars, which goods the said Sheriff sold at public auction at Macon, N. C, and the proceeds turned over to the said Augustus Wright, which the plaintiff herein is advised and believes, and so avers, is without authority and illegal, and that the said Sheriff and his special bondsman, the said S. P. Arrington, who signed the indemnifying bond heretofore mentioned, are responsible to this plaintiff, in the sum of one hundred and fifty dollars, the value of the said excess of goods so illegally sold at the time of said sale.

Wherefore, the plaintiff demands judgment against the defendants—

1. For the sum of one hundred and fifty dollars, with interest thereon from the time said goods were sold as aforesaid, to-wit, from the ---- day of ------, 1888, to ------; and,

2. For the costs of this action.

ANSWER.

The defendants, answering the complaint in the above entitled cause, say:

1. That paragraphs one and two thereof are admitted to be true.

2. That paragraph three is not true, but the defendants admit that a paper-writing, pretending to be an assignment from J. A. Nicholson to the plaintiff, has been executed, but they allege, and submit to the Court, that said pretended assignment is fraudulent and void upon its face, and they are informed and believe that the same was executed with the intent to hinder, delay or defraud the creditors of said J. A Nicholson, and is void.

3 That paragraph four, in so far as it alleges that Augustus Wright obtained judgments upon his debts against said Nicholson, and caused executions to be issued thereon and placed in the hands of the defendant J. R. Rodwell, as Sheriff of Warren County, is admitted to be true; said paragraph is, in all other respects, denied.

4. That paragraph five is not true, but it is admitted that the defendant J. R Rodwell, acting in his official capacity as Sheriff of Warren County, and under the executions mentioned in paragraph three of this answer, did duly lay off and assign to said J. A. Nicholson his personal property exemptions according to law, out of certain goods and merchandise in the town of Macon, N. C., and after setting apart such exemptions did levy upon and sell the interest of said Nicholson in the remainder of the said goods and merchandise (together with other property), realizing therefrom about the sum of fifty dollars at a fair sale, which, defendants allege, was the reasonable value of said goods. And the proceeds of such sale, after paying the expenses of sale, and the legal costs and charges under said executions, paid

the remainder to the said Augustus Wright. And the defendants are advised and believe that all the proceedings of the defendant Rodwell touching the property of said Nicholson were under and by virtue of the said executions issued to him as aforesaid as Sheriff of Warren County, and were in all respects regular and conformable to law, and that he acted in perfect good faith in all said proceedings.

Wherefore, the defendants pray to be hence dismissed without day, with their costs.

Messrs. W. R. Henry and *John Devereux, Jr.*, for plaintiff.
Mr. T. M. Pittman (by brief), for defendant.

Avery, J.—after stating the facts: The defendant contends that the deed appears, upon its face, to have been made and intended to secure the ease and comfort of the debtor, and that, therefore, there was no error in the ruling of the Court below that the plaintiff, who, as the assignee, claimed under it, could not recover. It is insisted that the provision that the assignee should be empowered to sell the goods on a credit was evidently intended to hinder, delay and defraud creditors, and that the clause reserving "the sum of five hundred dollars as exemption" was clearly inserted for the ease of the debtor. If it is manifest, upon reading the instrument, that though it was apparently executed with a fraudulent intent, still some explanation might be given and a different purpose shown, by evidence *aliunde*. The case belongs to the class that must be submitted to the jury to determine whether the presumption of fraud is rebutted, but where the facts set forth in the case agreed, and apparent from reading the deed of assignment, are not sufficient to raise a presumption of fraud, if the intent is not found as a part of the case agreed, then all the circumstances should be left to the jury, without instruction as to their weight, to determine whether the fraud was proven to their satisfaction. *Brown* v. *Mitchell*, 102 N. C., 364; *Berry* v. *Hall* decided at this term); *Hardy* v. *Simpson*, 13 Ired., 132; Bump. on F. C., ch. 4; *Hodges* v. *Lassiter*, 96 N. C., 351; *Frank* v. *Robinson*, 96 N. C., 28. This was a voluntary assignment, and therefore it was not necessary to show that the assignee participated in the fraudulent intent. *Savage* v. *Knight*, 92 N. C., 493; *Woodruff* v. *Bowles*, 104 N. C., 197.

The defendant's counsel cites and relies upon Waite on F. C., § 332, to sustain his position. The author adopts, as correct, the rulings of the Courts of New York, which have been followed in at least four or five other States. But the weight of authority, and reason as well, lead to the conclusion that the highest duty of a trustee is to look to and protect the interest of all the creditors whom he represents, and when he is left free to fix the terms of sale, it often proves prejudicial to their interests to refuse to extend credit, when thereby he can realize a better price for the property. *Johnson* v. *McAlister*, 30 Mo., 337; *Dance* v. *Seaman*, 11 Grattan, 778; *Scott* v. *Alford*, 53 Ala., 82; *England* v. *Reynolds*, 38 Ala., 370; *Conkling* v. *Comrad*, 6 Ohio St., 611; *Wright* v. *Thomas*, 1 Fed. Rep., 716; *Farquharson* v. *Eichelberger*, 15 Md., 63; *Gimell* v. *Adams*, 11 Hump. (Tenn.), 283.

If the trustee, clothed with such power, can often exercise it for the benefit of the *cestuis que trust*, the Courts must act upon the hypothesis that, as a rule, a fiduciary agent will act in good faith, and where, on account of his insolvency, or suspicious conduct, there is reason to apprehend that he will prove false to his trust, he may be removed. Bump. (in his work on Fraudulent Conveyances, p. 416), says: "If the instrument is wholly silent as to the manner or terms of sale, the authority of the assignee to exercise a discretion in regard to a sale for cash, or a reasonable credit, is unquestionable upon the ordinary principles which govern the duties of trustees. An express provision, therefore, for that which would be implied by law, if it were absent, will not vitiate the assignment." *Hoffman* v. *Mackall*, 5 Ohio St., 124.

So far from admitting that the clause allowing Bobbitt to sell on a credit raises *per se* a conclusive presumption of fraud, it seems to be consistent with perfect good faith, and falls so far short of giving rise to a presumption of fact against the validity of the deed that it can be considered even a badge of fraud. In some instances, on express provision in a deed of trust for delay in selling the goods conveyed, or for an unreasonable extension of credit, have been held to shift the burden upon an issue involving the question of parol to the party seeking to uphold the deed, while slightly variant limitations upon the power or liability of the trustee have been held to be circumstances to be submitted to the jury to determine their weight, as tending to show the fraud. *Hardy* v. *Skinner*, 9 Ired., 191; *Moring* v. *Little*, 98 N. C., 472; *Eigenbrun* v. *Smith*, 98 N. C., 207; *Frank* v. *Robinson*, *supra*. In the case of *Eigenbrun* v. *Smith*, *supra*, this Court held that the fact that a debtor in a deed conveying his property for the benefit of creditors reserves to himself the "personal property exemptions allowed him by the Constitution and laws of the State does not, in any manner, affect the validity of the deed, and is no evidence of a fraudulent intent or a purpose to hinder or delay his creditors." See also Burrill on Assignments, § 202.

After the description of the property conveyed in the deed, the language is as follows: "First reserving therefrom the sum of $500, *being the personal property exemptions exempted and allowed by the Constitution and laws of North Carolina to him.*" It is evident that, while the instrument is not very carefully written, the only fair interpretation that can be given it is, that the assignee, Bobbitt, was to *reserve* the sum of five hundred dollars in goods (he having received no money), and especially as the reservation is made by the terms of the deed synonymous with the amount allowed by law, which is "personal property to the value of five hundred dollars, to be selected by the party." Without a forced construction, we can find no requirement in the conveyance that the trustee shall first convert the property into money and then pay over the proceeds to the debtor, and, therefore, the question whether the attempt to reserve money instead of property would be a provision for the debtor's ease, and would make the deed fraudulent upon its face, is not presented. If, therefore, the ruling of his Honor rested upon the idea that the deed was fraudulent in law, it was erroneous.

The facts constituting the case agreed are, substantially, that the debtor purchased goods worth six hundred and fifty dollars in the earlier part of the Fall before making the assignment; that he executed the conveyance on the 28th day of November to the plaintiff, who was then, and is now, insolvent, and that the Sheriff levied upon and sold the remnant of the goods, inventoried at $115, left after the debtor selected those allowed him as an exemption, and realized from the sale at public auction fifty dollars. His Honor could not upon the facts found, therefore, declare that the deed was made with an intent to defraud creditors, unless he was at liberty to adjudge it fraudulent upon its face. It was the exclusive right of the jury to determine whether it was executed in good faith, and a case agreed could not subserve the purpose of a verdict and enable the Court to proceed to judgment, while the issue upon which the whole controversy hinged remained unanswered. *Phifer* v. *Erwin*, 100 N. C., 59; *Perry* v. *Hardison*, 99 N. C., 21; *Hodges* v. *Lassiter*, 96 N. C., 351. In *Beasley* v. *Bray*, 98 N. C., 266, Chief Justice Smith, delivering the opinion of the Court, says: "The Court, therefore, committed error in not submitting an issue as to the intent to the jury, which they, not the Court, must draw in ascertaining the presence of fraud. * * * We see no reason why an insolvent debtor may not sell to another, who, if he has not the present means to pay for his purchase, is also free from other debts." The insolvency of Bobbitt was, at most, only a circumstance to be submitted bearing upon the issue of fraud. If he is honest and competent, that fact does not necessarily disqualify him to act or show bad faith on the part of the maker of the deed in the assignment to him.

There must be a finding either by a jury, or, if a jury trial is waived, or the parties agree to another mode of finding the facts, it must be ascertained and declared as a fact in some manner authorized by law, either that the deed was or was not executed with intent to defraud creditors, before the Court can proceed to judgment.

There was error, for which a new trial must be awarded.

Error. New trial.

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*THE CHOWAN & SOUTHERN RAILROAD COMPANY v. ELIZABETH J. PARKER et al.

Constitution—Jury Trial—Condemnation of Land—Damages.

1. The Constitution (Art. I, § 19) guarantees the right to trial by jury, in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found, could not have been refused, and in fixing the question of compensation to the land-owner for right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged exclusively and peculiarly to the jury.
2. In special proceedings, pending before Clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the Clerk and transmitted to the Superior Court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it.

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*Head-notes by AVERY, J.

3. If the land-owner can even demand that an issue be found upon the question of damages in condemnation proceedings, previous to the appointment of commissioners, he cannot do so after the report of the commissioners and exceptions to it are filed. The Judge, then, has the power to order a new appraisement, to modify or confirm the report, but not to allow, on motion of one of the parties, in spite of the objection of the other, a trial of the issues by jury.

This was a Special Proceeding to assess damages for the right-of-way for a railroad through the land of defendants, tried on appeal from the Clerk at the September Term, 1889, of the Superior Court of GATES County, before *Boykin, J.*

The proceeding was regularly instituted before the Clerk, and upon the hearing commissioners were duly appointed, who met upon the premises, and, after being duly sworn, assessed the damages at the sum of two hundred dollars ($200), and duly made their report, as set out in the record.

The defendants objected to the finding of the commissioners, on the ground that the damages assessed were inadequate to the damages sustained by the farm by reason of the said right-of-way, and filed exceptions to the report; all of which were abandoned except the first, which is set out in the record. The Clerk overruled the exceptions and gave judgment in accordance with the report; and the defendants having appealed, the cause was tried at this term of the Court before his Honor, E. T. Boykin and a jury.

When the case was called for trial, counsel for plaintiff objected to trial by jury and insisted that the Court should pass upon the exceptions, and if no legal error nor irregularity appear in the report or conduct of the commissioners, that the report should be confirmed.

The Court overruled the objection and impaneled a jury, and the plaintiff excepted.

The issues submitted were as follows:

"Are the damages sustained by the defendants by the construction of plaintiff's road, as estimated by the commissioners, inadequate to repair their injury so received?"

"If so inadequate, what is the amount of damages so sustained?"

Mr. L. L. Smith, for plaintiff.

Messrs. W. D. Pruden and *S. L. Scull*, for defendants.

Avery, J.—after stating the facts: *The Code*, §§ 1945 and 1946, provides that where the prayer of a petitioner for condemnation of right-of-way is granted, the Clerk (the Court) shall appoint three disinterested and competent freeholders, and when their report is filed, "any person interested in the land may file exceptions to the report, and, upon the determination of the same by the Court, either party to the proceeding may appeal to the Court at term, and thence, after judgment, to the Supreme Court. The Court, or Judge, on the hearing, may direct a new appraisement, modify or confirm the report, or make such order in the premises as to him shall seem right and proper.

It seems to have been settled, in the case of *Railroad* v. *Davis* (2 D. & B., 451), that the Constitution (Art. I, § 19), guarantees the right to trial by jury in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the *quantum* of compensation to the land-owner for the right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. *Smith* v. *Campbell*, 3 Hawks, 590; *McIntire* v. *Railroad*, 67 N. C., 278; *Britt* v. *Benton*, 79 N. C., 177.

This is a special proceeding, and in the view of the case most favorable to the defendants they had the right to insist that any issues of fact raised by the pleadings should be framed by the Clerk and transmitted to the Superior Court in term, for trial by jury, and when they failed, before the order appointing the commissioners was made, to insist upon a verdict upon the controverted facts, they acquiesced in the new mode of trial provided therein and waived that which they might have claimed at first. *Railroad* v. *Ely*, 101 N. C., 8; *Spencer* v. *Credle*, 102 N. C., 68; *The Code*, §§ 116, 252, 256 and 1943

In *Ely* v. *Railroad*, *supra*, Chief Justice SMITH, delivering the opinion of the Court, said: "Whatever issues of fact are made in the pleadings should have been framed and settled by the jury, and it was too late to raise them after the verdict upon the one inquiry agreed on by counsel of the respective parties at the trial before the Judge." After apparently recognizing the right to have formulated and sent up other issues besides that transmitted and passed on, the Court held that, after the verdict was rendered and the Clerk again took cognizance of the case and appointed commissioners, "the parties must abide by their findings of other facts, as they must yield to those of a jury, ordinarily, unless set aside by the Court." That was a special proceeding to lay off a ditch.

The Code, § 1946, embodies, substantially, the same provisions as ch. 138, §§ 16, 17 and 18, Laws of 1871–'72.

In *Railroad* v. *Phillips*, 78 N. C., 50, Justice RODMAN, for the Court (in construing the act of 1871–'72), says: "There cannot be an appeal, in its ordinary acceptation, from the commissioners to the Superior Court, for the reason that they are not a Court, and for the further reason that they make their report directly to the Superior Court, just as a referee or master does. * * * It may be, however, that the parties have a right to have a trial by jury. And there seems to have been no objection made to a jury trial in this case. And in *Railroad* v. *Wicker*, 74 N. C., 220, there was a jury trial by consent." In the former case the Court gave judgment for the damages assessed by the jury for the right-of-way.

Whether the defendants could have demanded that an issue be framed upon the question of damages previous to the appointment of commissioners or not, in any case, we think that the Court erred in overruling plaintiff's motion and impaneling a jury to try the issues, after a report and exceptions had been filed. The Judge then had the power to order a new appraisement, to modify or confirm the report, but the authority to make "such orders in the premises as to him should seem right," did not empower him to disregard the protest of the plaintiff and restore to the defendants a right that they had previously waived, if the law had ever given it.

There is error. The judgment is reversed. The Court below must pass upon the exceptions to the report of the commissioners, and confirm or alter it, or order a new appraisement, as may be deemed best.

Error.

*G. W. HELMS v. J. L. GREEN.

Deed, How Attacked—Pleading—Evidence—Witness—Fraudulent Conveyance.

1. In actions for the recovery of land, as formerly in the action of ejectment, any deed offered as a link in a chain of title is thereby exposed to attack for incapacity in the maker, or because it was void under the statutes of frauds (13th and 27th Eliz.), though it may not have been mentioned in the pleadings; but where a party seeks to set aside a conveyance because of a fraudulent combination to prevent a fair competition of bidders, he must allege the fraud now as he was required formerly to file his bill in a Court of Equity.
2. *The Code* (§ 579) abolishes the action to obtain discovery under oath, and substitutes for it a remedy in harmony with the code system by allowing a party, in support of the allegations of his complaint, or of a cross-action set up in a counter-claim, after eliciting admissions from his adversary by verifying his pleadings, to examine such adversary party. as to facts within his peculiar knowledge, both before and at the trial of the action.
3. A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his.
4. The notorious insolvency of a bargainor in a deed executed to defraud his creditors is a circumstance tending to show that the bargainee, his son-in-law, who lived in the same neighborhood, participated in the fraud.
5. Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under 13th Eliz. (*The Code*, § 1545), as to his creditors.
6. The fact that it is exclusively within the power of persons so nearly related (as the defendant in this case and his father-in-law, the grantor Hinson) to explain every suspicious circumstance, if they

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* Head-notes by AVERY, J.

did act in good faith, and the neglect to do so voluntarily, or the failure of one of the parties, when he was forced to go upon the stand, to throw light upon it so as to fully establish, if their explanation were credited, the *bonâ fides* of the transaction, is to be considered as due to inability to show that their conduct was consistent with an honest purpose.

7. The presumption arises rather from the peculiar knowledge on the part of parties to a deed that would either confirm or remove suspicion raised by circumstances in evidence as to the embarrassment of the grantor and his relationship to the grantee than from any positive testimony as to the persons actually present at the transaction.

8. Badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not acceptable to his adversary.

9. It was this well-established rule of evidence that was laid down in *Reiger* v. *Davis*, 67 N. C., 189, but it was misconstrued and incorrectly stated in *Tredwell* v. *Graham*, 88 N. C., 208.

This was an ACTION begun in the Superior Court of UNION County, N. C., on September 12th, 1883, for the recovery of a tract of land situated in said county, and tried at February Term, 1889, of said Court, before *Clark, J.*, and a jury.

The following is a statement of the facts as far as is necessary to an understanding of the exceptions made by defendant, and which are the basis of the appeal. The plaintiff showed title out of the State, and in one W. B. Hinson, by introducing in evidence grants from the State to one Pinion and one McCollum, and subsequent and successive conveyances to said Hinson; and then offered in evidence a deed from the Sheriff, dated February 15th, 1882, regular in form, and duly proven and recorded, purporting to convey to plaintiff the land sued for, and reciting that the sale was had under execution issued upon judgment in favor of one

C. N. Simpson, administrator of W. H. Simpson, and against said W. B. Hinson, which judgment was docketed in the Superior Court of Union County, N. C., on the 21st day of August, 1881, as appeared by the recitals in the Sheriff's deed aforesaid; and upon the execution and judgment dockets of said Court, which were offered in evidence. After the introduction of these conveyances, all of which were admitted to cover the land in dispute, and after evidence as to defendant's being in possession of the land in dispute, and as to annual rental value of said land, the plaintiff rested his case. No exception is made, or was made upon the trial, to the evidence, charge of the presiding Judge, or verdict of the jury as to the questions of possession and damages. After plaintiff rested his case, the defendant offered in evidence a deed to himself from said W. B. Hinson and wife, dated March 30, 1881, proven and recorded in April, 1885, reciting a consideration of $300 as the amount of the purchase-money paid, a copy of which deed, with the probate thereof, is hereto appended as part of this statement of the case, and marked "A." It was admitted that this deed covered, or purported to convey, the land in dispute. After the introduction of this deed the defendant rested.

Exception 1.—Plaintiff then called defendant to the witness stand, had him sworn, and proposed to elicit from him testimony tending to prove said deed, executed to him by Hinson and wife, was fraudulent and inoperative. The defendant objected on the ground that said deed, as he claimed, could not be attacked for fraud in this proceeding, but that an action against the parties to said deed, for the purpose of having it cancelled for fraud, was plaintiff's only remedy by which he could attack said deed. Objection overruled, and defendant excepted.

The witness (defendant) then proceeded to testify that he was a son-in-law of W. B. Hinson; that the deed to him was dated the day he got it; that he took possession of the land shortly after he got the deed; that he was to pay $200 for the land; that he did not agree to pay more; that he gave his note to Hinson for the $200; that he has never paid anything on the note; that he gave no security for the payment of the note, nor did he give any mortgage to secure the note; that he didn't know whether or not Hinson was insolvent at the time he executed the deed to witness; that witness was never examined in supplemental proceedings taken out against Hinson; didn't know of Hinson conveying away other lands about that time to his (Hinson's) other son in-law; didn't know whether Hinson, at the time of the conveyance to witness, retained sufficient property to pay his (Hinson's) debts; that he heard that Hinson was put in jail for refusing to testify in supplemental proceeding instituted against him; that witness at the time of said conveyance, and from then to the trial of this case, was not worth more than his homestead and personal property exemption; that witness, and wife of witness, own 148 acres of land besides the land in dispute in this case; that the deed for the 148 acres was made to witness and his wife jointly, and was partly a gift and partly a purchase; that one hundred acres was given and forty-eight bought, and witness paid $240; that Hinson conveyed this 148-acre tract to witness and his wife four or five years after witness married Hinson's daughter; that witness now owns $150 worth of personal property, and is worth about the same now that he was when the deed for the land in dispute was executed to him. Hinson was considered good, or solvent, till a short time before he executed the deed to witness for the land in dispute.

Witness, on cross-examination, testified that there was no understanding between him and Hinson that he was to take the deed for the land in dispute for the purpose of keeping off Hinson's creditors; that, in his opinion, the land conveyed to him (the land in dispute) was not worth more than

$200, it being in litigation or in dispute at the time it was conveyed to him

Exception 2.—The plaintiff then proposed to offer further evidence, tending to attack said deed from Hinson to Green for fraud, and the defendant objected, and assigned as the ground therefor, that the plaintiff, having introduced the defendant as his witness, could not offer evidence tending to impeach or contradict him, but was bound to accept as true and conclusive the testimony of said witness. The Court overruled the objection in part, stating his opinion of the law to be that the plaintiff was not allowed, and would not be allowed, to introduce evidence for the purpose of impeaching the defendant, but that he would allow the plaintiff to show, if he could, a different state of facts from those as testified to by the defendant. The defendant excepted. Plaintiff then introduced as a witness, J. J. Medlin, who testified that he was, and had been for a long time, acquainted with W. B. Hinson; that in the year 1881, and at the time of the execution of said deed from Hinson to Green; it was generally reported that W. B. Hinson was insolvent.

G. W. Mullis, a witness introduced by plaintiff, testified that at the time of said conveyance from Hinson to Green, the said Hinson was generally reported to be insolvent; that the defendant, J. L. Green, at the time of said conveyance, was residing, and had resided for some time prior thereto, in about a mile or one mile and a half of the said W. B. Hinson; that D. R. Pusser, J. W. Love and the said J. L. Green were the sons-in-law of said Hinson, and were such sons-in-law during the year 1881, and for some time previous thereto.

It was in evidence by the plaintiff, who was examined as a witness in his own behalf, that the tract of land in dispute, and which was sued for, contained about one hundred and twenty-five acres, and was worth $5 or $6 per acre at the time of conveyance from Hinson to Green; and one E. H.

Hinson, who was likewise examined as witness for plaintiff, testified the same as G. W. Helms as to the quantity and value of the land at the time of said conveyance, *i. e.*, that there were about 125 acres of it. and that it was worth $5 or $6 per acre The witnesses Helms and E. H. Hinson both testified that in March, 1881, when said conveyance was executed, the said W. B. Hinson was generally reported to be insolvent, and was much involved in debt.

The witness Hinson, also testified that at the time said deed was executed, he (the witness) had a suit pending against said W. B. Hinson, in which he had sued for the recovery of $10,000, on account of alleged slanderous charges made against him by said W. B. Hinson, and that W. B. Hinson, before witness sued him, was solvent and worth $3,500 or $7,000. It was also in evidence that at the time of the execution of said conveyance to Green, one James Mullis had commenced suit against said W. B. Hinson, for the recovery of $5,000 on account of alleged slanderous charges made against said Mullis by said W. B. Hinson, and that said suit afterwards abated on account of the death of plaintiff Mullis. It was in evidence that the said suit of E. H. Hinson against said W. B. Hinson was compromised sometime after the execution of said deed from Hinson to Green. The execution dockets of the Superior Court of Union County, N C., were introduced, showing judgments which were rendered and docketed against said W. B. Hinson after the execution of said deed to Green; one for $179.25 and interest, one for $291.15 and interest, and the other amounting to about $60 and costs, all of which were rendered on debts contracted by the said W. B. Hinson several years before he executed said deed to Green. There was evidence that the two first named of these judgments have since been paid by T. L. Love and J. W. Love, while the last named judgment was one on which an execution issued and a sale was had by the Sheriff on February 6th, 1882, at which the plaintiff became the purchaser and took the deed, dated February 15th, 1882, as hereinbefore stated. The judgment and execution upon and under which said sale was had were introduced, showing Sheriff's return and allotment of exemptions to said W. B. Hinson, and that the said land in dispute in this action and which was sold by the Sheriff, was a part of the excess of the homestead allotted said Hinson. The note upon which said judgment was rendered was introduced in evidence, and was dated October 1st, 1874. It was in evidence that T. L. Love, the subscribing witness to the deed from Hinson to Green, was a brother to J. W. Love, one of the sons-in-law of said W. B. Hinson. It was in evidence that the said W. B. Hinson was committed to jail for refusing to be examined in supplementary proceedings instituted upon the judgments, which were afterwards paid by said T. L. Love and J. W. Love.

Plaintiff offered in evidence further the following deeds from W. B. Hinson to his sons-in-law D. R. Pusser and J. W. Love.

Deed to D. R. Pusser, dated December 23d, 1880, conveying a tract of land, and reciting a consideration of $1,000 as paid, and to J. W. Love, dated February 14, 1880, conveying a tract of land, and reciting a consideration of $275 as paid; a deed to J. W. Love, dated December 24, 1880, conveying a tract of land, and reciting a consideration of $325 as paid; and another deed to said J. W. Love, dated 11th day of March, 1881, conveying a large body of land and reciting a consideration of $6,500 as paid

Plaintiff closed his case, and the defendant offered in evidence the tax lists or tax returns for the years 1881 and 1882, showing the property returned by W. B. Hinson for taxation; the return for the year 1881, showing personal property to the amount of $1,060, and no realty, and the return for the year 1882, showing personal property to the amount of $1,585, and no realty The personal property returned for taxation in said years, according to the tax returns, consisted almost entirely of unspecified property. The defendant then closed his case.

The following are the issues submitted to the jury, and their answers thereto:

1. Is plaintiff the owner and entitled to the possession of the premises claimed in the amended complaint? Ans. Yes.

2. Does defendant wrongfully withhold possession thereof? Ans. Yes.

3. What damage has plaintiff sustained thereby? Ans. $2 per year.

There was a verdict for the plaintiff, and defendant moved for a new trial, and filed the following exceptions as grounds for his said motion:

Defendant's motion for new trial and exceptions in its support are as follows:

1. For that the Court erred in permitting the plaintiff to attack the deed made by W. B. Hinson to defendant for fraud, without giving notice thereof in the pleadings, and without bringing a direct proceeding for that purpose, as set forth in the first exception stated.

2. For that the Court erred in permitting the plaintiff to offer evidence tending to contradict the witness J. L Green, whom plaintiff had put on the stand, because the plaintiff had thereby vouched for the credibility of said witness, and could not be heard to attack him; and that while plaintiff was permitted to show a different state of facts from those testified to by said witness, for the purpose of showing he was mistaken, yet that rule was not applicable here, for the matters testified to by the witness must have been true or false to his knoweldge.

3. For that his Honor erred in giving the instructions asked for by the plaintiff, and refusing the 7th, 8th and

9th instructions asked for by defendant, and in modifying the 4th, 5th and 6th instructions asked for by defendant.

Mr. J. J. Vann, for plaintiff.

Messrs. D. Covington and *H. B Adams* for defendant.

AVERY, J.—after stating the facts: At an early period in the judicial history of this State, it was held that courts of law might hear evidence and allow a jury to pass even incidentally upon the question, whether a deed was void for fraud in the factum or under 13th or 27th Eliz. (*The Code*, §§1545 and 1546.) *Logan* v. *Simmons*, 1 Dev. & Bat., 16. Hence, in the trial of actions of ejectment where the question arose whether a deed, relied upon by either of the parties as a part of a chain of title, was executed to hinder, delay or defraud creditors, evidence was heard to attack or sustain such conveyances, though the action was not brought to directly impeach its character. *Lee* v. *Flannagan*, 7 Ired., 471; *Hardy* v. *Skinner*, 9 Ired., 191; *Hardy* v. *Simpson*, 13 Ired., 132; *Black* v. *Caldwell*, 4 Jones, 150; *Winchester* v. *Reid*, 8 Jones, 377; Wharton on Evidence, §931.

Where land has been sold at execution sale, a party seeking to set aside the Sheriff's deed because of a fraudulent combination to prevent a fair competition among bidders, was compelled to file his bill formerly in a Court of Equity and must now allege such facts in his pleadings as are relied upon to establish the fraud. *Young* v. *Greenlee*, 82 N. C., 346. But in actions for the recovery of land, as in the old action of ejectment, any deed offered as a link in a chain of title is thereby exposed to attack for incapacity in the maker or because it was void under the statute of frauds, though it may not have been mentioned in the pleadings. *Jones* v. *Cohen*, 82 N. C., 75; *Fitzgerald* v. *Shelton*, 95 N. C., 519. It is this distinction that makes the authorities cited and relied on by defendant's counsel inapplicable in the case before us.

The defendant asked the Court to instruct the jury that, "(4) even if said deed was executed by W. B. Hinson with the actual intent to defraud his creditors, still the plaintiff cannot recover unless the plaintiff satisfies you that the defendant Green co-operated in said fraudulent intent, or had notice thereof."

The Court gave the instruction, adding the words, "unless it was a voluntary deed, and not sufficient property was retained to pay Hinson's debts." And the defendant further prayed for the charge that, "(5) even if W. B. Hinson was notoriously insolvent, and the defendant knew it at the time said deed was executed, the law raises no presumption that Green knew that Hinson intended to defraud his creditors," to which the Judge added, "It is a circumstance, however, to be weighed."

It was eminently proper that the qualifying words should have been attached by the Court in both instances. There was evidence tending to show that Hinson was embarrassed with debt, and that he did not retain property sufficient and available to discharge his indebtedness. A number of witnesses testified that he was reputed to be insolvent. The defendant Green claims under a deed from Hinson and wife, executed March 20th, 1881, but proven and recorded in April, 1885. He offers the tax lists, showing that for the year 1881 W. B. Hinson returned $1,060, and for the year 1882, $1,585, consisting entirely of personal, and almost exclusively of "unspecified property." We cannot concede the correctness of counsel's position that the evidence tending to show fraud was rebutted by the return of property, the nature of which was not pointed out, and most of which, we must infer, could not have been reached by an ordinary *fieri facias.* There was evidence that made it proper that the Judge should modify the fourth instruction as he did. Hinson had not only disposed of all of his lands to different members of his family, at what witness said were inadequate prices, and afterwards returned for taxation property that did not appear to be within the reach of the ordinary process of law to subject it for debt, but the execution of the deed when no persons but members of the family were present, as insisted, the failure to register, the great discrepancy between the recited and alleged prices, the wide difference between the aggregate amount recited as consideration in the deeds to different members of his family and the amount upon which Hinson paid taxes soon after, and other circumstances, certainly justified the argument to the jury, and would have supported a finding by them that the deed to Green was voluntary, and that in fact no money was paid by him to Hinson for the land.

The fact that the defendant Green was examined by the plaintiff as a witness, does not preclude the latter from insisting before the jury that his testimony was not, and that of witnesses who contradicted him was true, nor prevent the Judge from submitting any view of the law predicated upon that hypothesis.

The Code, § 579, abolishes the action to obtain discovery under oath, and provides that no "examination of a party shall be had on behalf of the adverse party except in the manner prescribed in this chapter." The four succeeding sections, after providing how a party may be compelled to appear and answer both before and at the trial, conclude with the provision (section 583) that "the examination of the party thus taken may be rebutted by adverse testimony." The rules prescribed in that chapter for regulating such examinations, interpreted according to their plain import and construed in connection with section 268 of *The Code*, furnish a substitute equal to the old bill of discovery as a means of eliciting material facts within the peculiar knowledge of an adversary party, and which, moreover, harmonize with the general idea of the code system by obtaining the discovery and the remedy sought by the party asking it in the same action. *Coates* v. *Wilkes*, 92 N. C., 382. The allegations of the complaint, and every material allegation of new matter constituting a counter-claim in an answer, directly admitted or not denied, have the effect of a finding by a jury. *Bonham* v. *Craig*, 80 N. C., 224. When the pleadings are complete, other material facts may be elicited from an adversary by examination in support of the main action or the cross-action set up in the counter-claim, if the disclosures by way of admissions are not deemed sufficiently full. A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his. *Coates* v. *Wilkes*, *supra*; *Turner* v. *McIlhaney*, 8 Cal., 575; *Tul* v. *Byme*, 24 N. J., 631; *Drake* v. *Eakin*, 10 Cal., 312; Wharton Ev., §§ 488, 489. We think, therefore, that neither the defendant's second assignment of error, nor his exception to the refusal to give his instructions numbered 8 and 9, can be sustained.

The Judge unquestionably stated the law correctly when he told the jury that the notorious insolvency of Hinson, if admitted, as set forth in the prayer of defendant, would be a circumstance tending to show that the defendant was a participant in the fraud, and we concur in the propriety of modifying the original proposition drawn by defendant, as it was qualified by the addition made by the Court.

The declared object in enacting 13 Eliz. was to avoid and abolish "feigned gifts, grants, alienations, &c., which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts." So that, if Hinson had conveyed to Green in order to evade the payment of any judgment that might be recovered in an action for slander then pending against him, the deed must be treated as fraudulent in so far as it affected the rights of creditors, such as the plaintiff in the execution under which G. W. Helms bought. 2 Blk., 436; 2 Atkins' Reports, 481.

The defendant asked the Court to instruct the jury that, "even though the purchase money agreed to be paid may have been less than the actual value of the land, this can raise no presumption against the defendant, for it is in proof that the land was involved in litigation, and this fact may well explain the inadequacy of price."

In lieu of this the Judge charged them: "That if the jury believe that W. B. Hinson, being much involved in debt, conveyed to his son-in-law, J. L. Green, the land in dispute at much less than its value, and the said son-in-law was himself insolvent at that time, and secured the purchase-money by executing his individual note, which has not been paid, and without any further security, then the law presumes the said deed to be fraudulent, and it is incumbent upon the defendant to rebut said presumption, for the law looks with suspicion upon such transactions between near relatives."

The rule laid down by Justice BOYDEN in *Reiger* v. *Davis*, 67 N. C., 189, was, that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent; but when these relatives are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them.

In *Brown* v. *Mitchell*, 102 N. C., 372, it is said that, in *Reiger* v. *Davis*, *supra*, the Court intended only to lay down a rule of evidence applicable in all cases, whether an issue of fraud is involved or not, that "where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him."

The language used by Justice BOYDEN is not correctly reproduced in the syllabus that seems to have led to an incorrect inference in *Tredwell* v. *Graham*, 88 N. C., 208. But in any view of the case, it is only after the relatives, who were present, make some explanation which, if believed, inspires confidence in their good faith and shows that they had no reason or purpose to conceal any of the circumstances attending the transaction or the motives leading to it, that the presumption is rebutted and the inadquacy of consideration and the failure to summon others to witness what occurred in the family dwindles in importance from the basis of presumption to mere badges of fraud. Green, when forced as an unwilling witness to testify, did not repel the presumption of a fraudulent intent by showing that there was no purpose to conceal the fact that the conveyance had been made, and that in fact there was no intention, so far as he knew, on the part of Hinson, to defraud creditors. The explanation made by him is couched in very well guarded language. He testified, on cross examination, that there was "no understanding between him and Hinson that he was to take the deed to the land in dispute for the purpose of keeping off Hinson's creditors," and he did not say that the price was equal to the real value of the land, but was as much as it was worth, with the cloud of litigation as to the title hanging over it. He assigned no reason for postponing the registration of the deed, nor did he state that it was the positive purpose of his father-in-law to exact, and of himself to pay, the consideration evidenced by the note. He does not state why it was that the recited consideration was $300, while the real price was $200. In order to repel the presumption of fraud, the explanation, when attempted, should have been so full that, if believed, it would have relieved the transaction of all suspicion and established the good faith of the parties to it. The fact that it is exclusively within the power of persons, so nearly related as the defendant and his father-in-law Hinson, to explain every suspicious circumstance, if they did act in good faith, and the neglect to do so voluntarily, or the failure of one of the parties, when he was forced to go upon the stand, to throw light upon it, so as to fully establish, if their explanations were credited, the *bona fides* of the transaction, is to be considered as due to inability to show that their conduct was consistent with an honest purpose. The presumption arises rather from the peculiar knowledge, on the part of parties to a deed, of facts that would either confirm or remove suspicion raised by circumstances in evidence as to the embarrassment of the grantor and his relationship to the grantee and the failure to state or prove what they know, than from any positive testimony as to the persons actually present at the transaction Badges of fraud are suspicious circumstances that overhang a transaction (such as those we have already mentioned in this case), and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party, as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not accessible to his adversary. Wharton on Ev., §§ 1266 to 1269. This is consistent with the rules as to the *quantum* and quantity of proof requisite upon issues of fraud heretofore laid down by this Court. *Brown* v. *Mitchell*, *supra*; *Harding* v. *Long*, 103 N. C., 1; *Berry* v. *Hall*, at this term.

The defendant cannot demand that this Court, under a general exception to the charge, should follow him in a search for error in every part of it. We can go no further than to review the portion of the charge substituted for the special instruction asked. *McKinnon* v. *Morrison*, 104 N. C., 354.

There is no error. Affirmed.

*MARY F. ANDERSON et al. v. G. W. LOGAN.

Pleading—Counter-claim—Deed, Construction of—"Heirs"

1. The facts relied upon as the basis of a defence or counter-claim must be set out in an answer with the same precision as is requisite in a complaint, and, therefore, a defendant who expects to prove that there was an actual mistake by which the word "heirs" was omitted from a deed which he proposes to offer in evidence, or to insist that there is internal evidence in such deed that the grantor intended to convey the fee and omitted the word of inheritance by mistake, must set up his equity in his answer.
2. The Courts, in order to carry out the intent of the grantor, where it could be gathered from the face of a deed, have construed conveyances as passing an estate of inheritance in all cases where the word "heirs" was joined as a qualification to the name or designation of the bargainees, even in the clause of warranty, or where the covenant of warranty was confused with the premises or *habendum*, if, by a transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word "heirs" could be made to qualify the apt words of conveyance in the premises, or the words "to have and to hold" in the *habendum* and *tenendum*, even though it was made to do double duty as a part of the covenant of warranty.
3. Where there are no words of conveyance in the instrument, or where the word "heirs" does not appear in any part of the deed except in connection with the name of the bargainor, or with some expression, such as "party of the first part," used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the Act of 1879 was passed, will be construed as vesting only a life estate in the bargainee.
4. Where the deed set forth that the bargainors, "for and in consideration of the sum of two thousand dollars to them in hand paid by J. W., doth give, grant, bargain, sell and convey all of the piece or parcel of land, or so much as our interest, lying and being," &c. (giving a description of the land), "to have and to hold all of our interest in the above-mentioned lot *from ourselves*, *our heirs* and all that may claim *under us* and our *assigns* forever, all that above-mentioned lot and premises": *Held*, that the bargainee took only a life estate.

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*Head notes by AVERY, J.

This was an Action for the Recovery of Land, tried at the Spring Term, 1889, of the Superior Court of RUTHERFORD County, before *Clark, J.*

The plaintiffs offered a deed to Mildred Bowen from the executors of James Bowen, dated December, 1825, which, it was admitted, covered the land in controversy, and also the record of the will of James Bowen, proven in October, 1825. The plaintiffs also proved that Joseph Bowen, the husband of said Mildred, was in possession before her death, and that said Mildred Bowen, and those claiming under her, had continuous possession of said lot or land in dispute from the year 1831 till the year 1869.

The said Mildred Bowen was twice married—first to Jos. Bowen, by whom she had a son, Thomas Bowen, who died, without issue, in April, 1879, and Mary F. Bowen, who inter-married in 1846 with Joseph Anderson, who died in 1847; and second, to J. H. Wilkins, the issue of which marriage were the plaintiff W. T. Wilkins and the plaintiff Sarah J. Wilkins, who inter-married with John Tillinghast. J. H. Wilkins died in the year 1884, and this action was brought in the year 1885.

The defendant offered in evidence a deed from W. T. Wilkins and S. J. Wilkins (now Tillinghast), dated in 1864, covering the *locus in quo*, and contended that it was a deed in fee-simple. The Court held that it conveyed only an estate during the life of J. H. Wilkins, and defendant excepted.

The defendant asked that an issue be submitted to the jury as to the true construction of the deed. The Court declined, and defendant excepted.

The Court, at the close of the evidence, remarked to counsel that it would have submitted an issue as to whether the deed had been made for a life estate by mutual mistake, but there had been no evidence tending that way.

The defendant then offered in evidence a deed from Martin Walker, Sheriff of Rutherford County, to defendant, for all the interest of J. H. Wilkins in the *locus in quo*, dated November 3, 1869.

The Clerk testified that after diligent search he could find no execution against J. H. Wilkins, as recited in said deed. The defendant entered into the possession of the property soon after the date of said deed, and had been in continuous possession ever since.

EXHIBIT "A."

This indenture, made and entered into this 12th day of September, in the year of our Lord one thousand eight hundred and sixty-four, between Sarah Jane Wilkins and William Terrell Wilkins of the county of Rutherford, State of North Carolina, of the one part, and J. H. Wilkins, of the aforesaid county, of the other part—

Witnesseth: That for and in consideration of the sum of two thousand dollars, to them in hand paid by the said J. H. Wilkins, doth give, grant, bargain, sell and convey, all that piece or parcel of land, or so much as our interest, lying and being in the township of Rutherfordton, and county and State aforesaid, beginning at the corner of said lot, next to the court-house, and runs thence 8 west with Main street 80 feet 7 inches, to the corner of McEntire's lot, on said street; thence north 82 west 116 feet 10 inches to a stake, on the side of the back street; thence south 8 west 94 feet 7 inches to the corner of the lot purchased of Graham; thence with the line of said lot south 82 east 282 feet 10 inches to the public square, the other corner of the Graham lot; thence north 82 east 14 feet with the line of the public square to a stake; thence south 82 east to the beginning, agreeable to the plan and plot of said lot and premises: to have and to hold all our interest in the above mentioned lot from ourselves, our heirs, and all that may claim under us, and our assigns forever, all that above mentioned lot and premises.

SARAH J. WILKINS. [Seal.]
W. T. WILKINS. [Seal.]

Witness: WM. ANDERSON,
T. B. TWITTY.

The defendant asked the Court to instruct the jury that plaintiff, on the evidence, could not recover, because—

1. The claim was barred by the statute of limitations.

2. Because James Bowen's will did not give his executors power to make sale of his realty.

3. Mrs. Anderson was sole heir at law of Joseph Bowen, and that her title was barred by statute of limitations.

No title or color of title in Joseph Bowen having been shown, the Court so refused to charge. Exception by defendant. Verdict for the plaintiff on all the issues as set out in the record.

Motion by defendant for new trial, assigning as errors the exceptions above noted. Motion overruled; judgment signed; appeal by defendant.

Counsel for defendants abandoned in this Court the exceptions not set forth above. The defendant excepted.

Messrs. J. A. Forney and *M. H. Justice*, for plaintiffs.

Messrs. T. P. Devereux, W. A Hoke and *J. C. L. Harris*, for defendants.

AVERY, J.—after stating the facts: The facts relied upon as constituting the basis of a defence or counter-claim, must be set out in an answer with the same precision as is requisite in a complaint. *Rountree* v. *Brinson*, 98 N. C., 107. Therefore, an equitable defence must be set forth in an answer, as well as proven on the trial, just as the grounds of equitable relief demanded must be distinctly alleged in a complaint, and the *probata* made to correspond. In *Vickers* v. *Leigh*, 104 N. C., 248, the plaintiffs brought their action (in the nature of a bill in equity) to correct a mistake in omitting the word "heirs" from the deed, and the prayer in the bill in *Rutledge* v. *Smith*, Busbee's Eq., 283, was that a similar mistake be corrected in the same way. So that, if we were to concede (though we are not prepared to do so) that there is internal evidence in the language of the deed sufficient to show that the grantors intended to convey the fee, and omitted the word "heirs" by mistake, the answer fails to set up any such equity, or any but strictly legal grounds of defence. It is needless, therefore, to draw distinctions between the form of this deed and that which was the subject of the action in *Vickers* v. *Leigh*, *supra*. We could not *ex mero motu* grant equitable relief to the parties who fail to lay the necessary foundation by alleging the facts which, as they claim, entitle them to it.

But the defendant contends that even in a Court of law, under the old system, the deed would have been so construed by transposing the word "heirs" from the covenant of warranty to the *habendum* as to make it pass to J. H. Wilkins the fee in the land conveyed. The old established rule was that, in order to create an estate of inheritance, the word "heirs" must appear either in the premises or the *habendum* of the deed. 2 Black., 298; *Stell* v. *Barham*, 87 N. C., 62. The Courts, in order to carry out the intent of the grantor, where it could be gathered from the face of a deed, have, in a liberal spirit, construed conveyances as passing an estate of inheritance in all cases where the word "heirs" was joined as a qualification to the name or designation of the bargainees, even in the clause of warranty, or where the covenant of warranty was confused with the premises or *habendum*, if, by a transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word "heirs" could be made to qualify the apt words of conveyance in the premises, or the words "to have and to hold" in the *habendum* and *tenendum*, even though it was made to do double duty as a part of the covenant of warranty. Among the cases falling under this principle are *Staton* v. *Mullis*, 92 N. C., 623; *Graybeal* v. *Davis*, 95 N. C., 508; *Hicks* v. *Bullock*, 96 N. C., 164; *Bunn* v. *Wells*, 94 N. C., 67; *Ricks* v. *Pulliam*, 94 N. C., 225; *Phillips* v. *Thompson*, 73 N. C., 543; *Waugh* v. *Miller*, 75 N. C., 127; *Allen* v *Bowen*, 74 N. C., 155; *Phillips* v. *Davis*, 69 N. C., 117.

But where there are no words of conveyance in the instrument, or where the word "heirs" does not appear in any part of the deed, except in connection with the name of the bargainor, or with some expression such as "party of the first part," used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the Act of 1879 was passed, will be construed as vesting only a life estate in the bargainee. *Batchelor* v. *Whitaker*, 88 N. C., 350; *Stell* v. *Barham*, *supra*.

The material portions of the conveyance, referred to as exhibit "A," are as follows: "Witnesseth, that for and in consideration of the sum of two thousand dollars, to them in hand paid by the said J. H. Wilkins, doth give, grant, bargain, sell and convey all of the piece or parcel of land, or so much as our interest, lying and being," &c. (giving a description of the land), "to have and to hold all of our interest in the above mentioned lot *from ourselves, our heirs* and all that may claim under us, and our assigns forever, all that above mentioned lot and premises." The instrument is written in the first person and the word "heirs" is used only once, qualified by the pronoun "our," and plainly referring to the bargainors, so that no transposition can cure the fatal defect.

If there were no other difficulty in the way, we could not declare that the word of inheritance had been omitted by mistake, where there is no allegation of mistake in the answer, and we find among all the cases decided by this

Court, no instance in which the word "heirs," when distinctly used in connection with the word or designation of a bargainor, in a covenant of warranty, has been made to serve the additional purpose of creating an estate of inheritance in the bargainee.

There is no error. The judgment of the Court below must be affirmed.

Affirmed.

HENDERSON TUCKER v. E. W. WILKINS.

False Imprisonment—Arrest—Pleadings—Evidence—Probable Cause—Appeal—Damages.

1. In an action for false imprisonment, the defendant admitted, by not denying in his answer, that the warrant of arrest under which the plaintiff was taken in custody was issued before action was begun by issuing summons: *Held*, that such admissions, in another action, should be taken as true, and any evidence admitted on that point was irrelevant.
2. Evidence that defendant never made any demand for the debt upon which the warrant of arrest was issued, was competent to show the absence of probable cause and the animus of defendant in issuing the warrant.
3. Mere general rumor that a person indebted has removed to another State is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application.
4. The pendency of an appeal from a judgment of the Justice of the Peace upon the cause of action—the order of arrest having been discharged as void—is no bar to the maintenance of an action for unlawfully causing the arrest of an alleged debtor upon the void order of arrest.

This was a CIVIL ACTION, tried at the Fall Term, 1889, of HALIFAX Superior Court, before *Boykin, J.*

The complaint formally alleges two distinct causes of action. The first is for false imprisonment, in that the defendant procured a warrant of arrest to be issued by a Justice of the Peace, and had the plaintiff arrested upon the same by a proper officer and deprived of his liberty "for twenty hours," the warrant being void, because no action had been begun by the defendant against the present plaintiff by summons to recover his alleged debt specified in the warrant. The second cause of action is for malicious prosecution, in maliciously suing out a warrant of arrest without probable cause.

The issues submitted to the jury were as follows:

1. Did the defendant Wilkins, on or about the 17th day of December, 1888, wrongfully and illegally cause the arrest of the plaintiff, in the manner set out in the complaint?

2. Did the defendant Wilkins, on or about the 17th day of December, 1888, with malice and without probable cause, cause the arrest and imprisonment of the plaintiff, as alleged in the complaint?

3. What damage, if any, is the plaintiff entitled to recover?

It was alleged that the warrant of arrest was issued and served on the 17th of December, 1888, and a summons was afterwards issued pertinent on the 18th of the same month. On the trial the plaintiff was allowed to put in evidence a summons, dated the 18th of the same month in another action, and the defendant excepted. He was allowed to testify in his own behalf among other things, "Wilkins never made any demand on me before I paid $10, nor thereafter."

The defendant excepted.

The defendant proposed to testify on his own behalf that "it was generally rumored in the neighborhood that plaintiff had gone to Virginia to live, and that he had heard and believed such rumor," and he believed, "at the time he had plaintiff arrested that plaintiff had removed to Virginia." The proposed evidence was rejected and the defendant excepted.

The following is part of the case stated on appeal:

"The defendant asked the Court to instruct the jury—

"4. That if the jury is satisfied from the evidence that the action of *E. W. Wilkins* v. *Henderson Tucker*, and the order of arrest issued therein, were taken by appeal to the Superior Court, and are now pending there, then the plaintiff cannot recover in this action.

"5. That, upon the whole evidence, the plaintiff cannot recover.

"6. That plaintiff having shown no actual damages, the jury cannot find for the plaintiff more than nominal damages.

"7. That, upon the whole evidence, the plaintiff cannot recover in this action.

"8. That there is no evidence before the jury that the summons in the case of *E. W. Wilkins* v. *Henderson Tucker* was not issued until after the order of arrest, and in the absence of such evidence the presumption is that the summons was issued before, or at the time, the order of arrest was issued."

In answer to the fourth prayer, the Court told the jury that, if they believed the evidence, the order of arrest had, on motion of the defendant therein made at the trial in the Justice's Court, been vacated, and said defendant released and discharged from arrest, and if no appeal was taken therefrom, then an appeal taken by said defendant from the judgment for the debt duly rendered against him did not have the effect of taking up the judgment vacating the order of arrest, and the pending of the action on the account on appeal could not affect this action.

The Court refused to give the fifth, sixth, seventh and eighth prayers as asked, and defendant excepted, but instructed the jury that, if they believed the evidence, there was not probable cause for the arrest of the plaintiff in the action of *E. W. Wilkins* v. *Henderson Tucker;* and if they believed that the arrest was prompted by malice on the part of said Wilkins, then the jury should answer Yes to the second issue. The Court then instructed the jury as to what constituted malice; that in law it meant an act done wrongfully, with a desire or purpose to injure, and without reasonable and probable cause, and that the act need not be dictated by angry feelings and vindictive motives; that the jury could infer malice from want of probable cause, but it was an inference which could be rebutted; and if they believed the evidence of the defendant Wilkins, then he was not actuated by malice, and they should answer No to the second issue.

Defendant Wilkins excepted.

The Court further instructed the jury, that if they found the second issue No, and the first issue Yes, they could not give punitive damages, but only give such damages as they thought, from the evidence, was a reasonable compensation for the annoyance, loss of time and indignity put upon plaintiff; but if they found the second issue Yes, then the jury could, if they saw fit, give the plaintiff exemplary, or punitive, damages. The defendant excepted.

The Court further instructed the jury that if, from the evidence, they believed the order of arrest was issued before the summons, then the jury should find the first issue Yes; otherwise, no. Defendant excepted.

The jury returned a verdict finding the first and second issues Yes, and assessing plaintiff's damages at $300. There was a motion for a *venire de novo* for error in admitting and rejecting evidence, as hereinbefore stated, and for failing to give instructions asked, and in those given.

The Court gave judgment for the plaintiff, and the defendant appealed.

Mr. J. M. Mullen, for plaintiff.
No counsel *contra.*

MERRIMON, C. J.—after stating the facts: The first exception is without force, because, although the summons received in evidence was irrelevant, it was harmless, as the defendant admitted by his answer that the summons issued in his action before the Justice of the Peace was issued on the 18th of December, 1888. The complaint so alleged expressly, and the defendant did not in his answer deny the allegation. It was, therefore, to be taken for the purposes of the action as true. *The Code*, § 268; *Grant* v. *Gooch*, decided at this term, and cases there cited.

Obviously, the evidence of the plaintiff, testifying in his own behalf, embraced by the second exception, was competent. It, in connection with the other evidence, tended to prove the absence of probable cause and the animus of the defendant in suing out the warrant of arrest. It was of slight importance.

The evidence of the defendant, testifying in his own behalf, embraced by the third exception, was properly rejected. Merely general rumor that the plaintiff had gone to the State of Virginia did not constitute probable cause, nor could it warrant, justify or excuse the action of the defendant in suing out a warrant of arrest. He should have made inquiry of those who would probably know that the rumor was well or ill founded, or have ascertained facts and circumstances such as would prompt a rational, fair and prudent man, having just regard for his own rights, and the like of others, to believe that the facts alleged and made the basis of the application for the warrant of arrest did in fact exist. Mere rumor could give rise to only suspicion and vague conjecture. Besides, the warrant of arrest was not asked for upon the ground that the defendant therein had removed to Virginia, but upon the other alleged ground that he had "removed, disposed of, or secreted, or is about to remove, dispose of, or secrete his property, with intent to defraud his creditors." The evidence so rejected was irrelevant.

The evidence did not warrant the fourth instruction asked for by the appellant. All the evidence, fairly interpreted, went to prove that the Justice of the Peace before whom the action was tried vacated the order of arrest and discharged the defendant therein, and there was no appeal from the order in this respect, so far as appears. The defendant in the action appealed from the judgment given against him for the amount of the debt demanded, but this did not vacate the order vacating the order of arrest and discharging the defendant therefrom. *Roulhack* v. *Brown*, 87 N. C., 1; *Pasour* v. *Lineberger*, 90 N. C., 159.

The other exceptions are without merit. The Court was fully warranted in telling the jury that, if they believed the evidence, there was not probable cause. Indeed, there was no evidence, so far as appears, tending to prove the alleged fraudulent disposition by the plaintiff of his property. Manifestly, there was evidence from which the jury might find the issue of fact in respect to the arrest of the plaintiff, with malice and without probable cause, in his favor, and the defendant has no reason to complain of the instruction given in respect to damage.

Affirmed.

JAMES W. GRANT, Adm'r, v. J. T. GOOCH, Adm'r, et al.

Bond—Presumption of Payment—Admissions in Rebuttal—Executors—Record—Evidence.

1. Where a single bond was executed in 1860, and more than ten years, exclusive of time between May, 1861, and January, 1870, had elapsed before the bringing of an action upon it, there is a presumption of payment or satisfaction thereof.
2. To rebut this presumption, the admissions of the maker and his administrator are both competent; but the mere admission of the administrator that *he* had not paid it would not be sufficient to rebut the presumption as to his intestate.
3. Ordinarily, evidence to rebut the statute of presumptions ought to embrace the whole period.
4. Where, in a former action in which *the same* instrument was in controversy, the administrator of the maker did not deny the *allegation* that the bond had not been paid: *Held*, that upon the trial of a subsequent action, in which the question of payment was an issue, the record of this admission could be read as evidence to rebut the presumption of payment.
5. The fact that such former action was decided in favor of the defendant, cannot avail to affect or lessen the weight of the admission.

This was a CIVIL ACTION, heard at the May Term, 1889, of HALIFAX Superior Court, upon a report of a referee, by *MacRae, J.*

The case presented by the record is, in substance, this: It appears that Eliza A. Phillips died in the county of Northampton prior to 1860, leaving a last will and testament, which was proven, and Joseph M. S. Rogers qualified as executor thereof. Afterwards, John J. Long, the intestate of the defendant, executed to the said executor his single bond for $290.65, dated the 22d of May, 1860, and due at six months from date. Afterwards, the said executor died in the same county, on the 3d of July, 1876, and the plaintiff was appointed administrator *d. b. n. c. t. a.* of the said testatrix, Eliza A. Phillips. The said Long afterwards died on the 9th of May, 1877, and Edward Conigland was appointed administrator of his estate; and afterwards, in the same year, the said Conigland died and the defendant was appointed administrator *de bonis non* of the said Long, deceased.

This action is brought by the plaintiff, administrator *d. b. n. c. t. a.* of the said Eliza A. Phillips, deceased, to recover judgment for the money due upon the single bond above specified against the defendant, as administrator *de bonis non* of the maker thereof. The defendant pleaded payment, and "that the cause of action declared on arose, if at all, more than ten years before the commencement of this action."

It appears also that on the 19th of February, 1879, W. J. Rogers, as executor of the said Joseph M. S. Rogers, who was in his life-time executor of the will of the said Eliza A. Phillips, deceased, as above explained, brought his action in the Superior Court of the said county against the present defendant administrator, &c., to recover judgment for the money due upon the single bond above mentioned, claiming and alleging that the same belonged to the estate of his testator. In that action it was expressly alleged, among other things in the complaint, "that no part of said bond (that therein specified and that now sued upon) has been paid," The defendant in that action (who is the present defendant) did not in his answer therein deny or controvert the last above recited allegation of the complaint therein.

In this case there was a reference, and the referee was charged "to hear and determine all matters of law and of fact arising herein. On the trial before the referee, the plaintiff put in evidence, the defendant objecting, the record of the action last above mentioned and referred to, for the purpose of proving that the said single bond now sued upon had not been paid, and to rebut the presumption of payment created by the lapse of time and the statute (Rev. Code, ch. 65, sec. 18). The defendant objected, and excepted to the reception of such evidence. The referee found, as a fact, that the bond had not been paid. The Court affirmed the findings of the referee as to the law and facts, and gave judgment in favor of the plaintiff, from which the defendants appealed.

Mr. J. M. Mullen, for plaintiff.
Mr. R. B. Peebles, for defendants.

MERRIMON, C. J.—after stating the facts: The single bond sued upon in this action having been executed in 1860, and more than ten years having elapsed after its maturity, excluding the time from the 20th of May, 1861, to the 1st of January, 1870, as required by the statute (*The Code*, § 137), before the action began, the statute applicable (Rev. Code, ch. 65, sec. 18) raised "the presumption of payment or satisfaction" thereof. The plaintiff, however, had the right on the trial to rebut such presumption by any competent evidence to prove that the bond had not been paid or satisfied. One sort of competent evidence for that purpose was the admission of the maker of the bond in his life-time, or of the defendant, his administrator, after his death, that it had not been paid. The admissions and declarations of the latter in such respects are competent evidence, because he legally represents his intestate—has possession and control of all his personal property—rights, credits, his receipts, acquittances, his business papers, and the like; has the opportunity and means of learning of the indebtedness of his intestate, and it is his duty to do so. It is presumed that he discharges his duty properly, and that he will not admit that such bond, brought against his intestate's, estate is due and unpaid, when, in fact, it had been paid. If such bond, presumed to be paid, has not in fact been paid, he may pay it. *Tucker* v. *Baker*, 94 N. C., 162, and the cases there cited. The mere admission, however, by the administrator that he had not paid the bond as to which such presumption existed, would not be sufficient to rebut the presumption; his intestate may have paid it in his life-time. Ordinarily, the admissions, or other evidence to rebut the presumption of payment of such bond in question, must be such in its scope, meaning and effect as will embrace the whole period of ten years, the lapse of which raises the presumption. *Rowland* v. *Windley*, 86 N. C., 36, and the cases there cited.

Now, the present defendant, being defendant in another action determined before this one began, the bond here sued upon being the subject of that action, admitted, in legal effect, not simply that he had not paid this bond, but that it had not been paid at all, by his intestate or any person; that it remained due and unpaid. It was alleged in the complaint in that other action, in express terms, "that no part of said bond (that now sued upon) had been paid." The defendant answered the complaint in that action as to the allegations therein, other than the one above mentioned. As to it, he was silent. Such silence—failure to deny that the bond was unpaid—was an admission of and by the defendant that it had not been paid—not merely an implied admission, but the statute (*The Code*, § 268) provides and declares that such allegation that the bond had not been paid would "be taken as true." This Court, in construing this statute, said, in *Bonham* v. *Craig*, 80 N. C., 224, that "the complaint alleges that there was no money paid, and the deed was the voluntary act of the grantor, and this allegation is not denied in the answer. The fact is, therefore, admitted, and the effect of the admission is as available to the plaintiff as if found by the jury." Other cases are to the like effect. *Jenkins* v. *The Ore Co.*, 65 N. C., 563; *Kelly* v. *McCallum*, 83 N. C., 563. Such admissions ordinarily imply that they were made deliberately and of purpose, but they are subject to explanation when used as evidence. They constitute evidence against the party making them in all actions and proceedings against him, wherein they may be pertinent and competent, just as are admissions and declarations of a party made adverse to his right on any occasion. Their weight depends always upon whether or not they were made with deliberation or incautiously, and they are subject to proper explanation. *Mason* v. *McCormick*, 85 N. C., 226; *Adams* v. *Utley*, 87 N. C., 356; *Guy* v. *Manuel*, 89 N. C., 83; *Brooks* v. *Brooks*, 90 N. C., 142; *White* v. *Beaman*, 96 N. C., 122; *Smith* v. *Nimocks*, 94 N. C., 243.

The referee, therefore, properly considered the admission made by the present defendant in the answer in the action referred to in determining the question, whether or not the bond now sued on had been paid. The fact that that action was decided in favor of the defendant therein could not affect his admissions as evidence in this action. And we may add here that that action failed because the plaintiff therein was not the owner of, and entitled to sue upon, the bond—the subject of the present action. *Rogers* v. *Gooch*, 87 N. C., 442.

Affirmed.

THE SOUTHERN FERTILIZER CO. et al. v. H. A. REAMS et al.

Insurance — Assignment — Equity — Finding of Facts by the Court — Supplementary Proceedings — Judgment — Creditor's Lien — Registration — Contract — Partnership.

1. When, pursuant to the agreement of the parties, the Court finds the facts of a case, such findings are conclusive, subject to the exceptions—(1) that there was no evidence to support them; (2) that incompetent evidence was admitted; (3) or that some material fact or question was left out of consideration.
2. This Court will not review the finding of the Court below which was against the weight of the testimony.
3. An exception that the Court refused to *find* certain specified facts is not sufficient. The Court must have failed or refused to *pass upon or consider* such facts or questions arising therefrom.
4. Where, in supplementary proceedings, the judgment creditors of R. sought to subject the amount recovered by R.'s receiver in suits against certain insurance companies on account of loss by fire of some tobacco, which loss was payable to one M.: *Held*, that where such suits were brought to determine the *liabilities of the insurance companies solely*, and the other questions were left to be determined by these proceedings, the finding of the Court in those suits that R. was the sole owner of the tobacco was not an estoppel upon M., who was resisting the claims of the judgment creditors.
5. If M. had no technical insurable interest, only the insurance companies could avail themselves of it as a defence on account of such contracts being against public policy.
6. The plaintiffs—judgment creditors—having no lien on the tobacco and no interest in the insurance money recovered, must pursue their rights, if any, *in equity*.
7. A contingent assignment of an insurance policy, with the subsequent assent of the company, makes a new and valid contract with the *assignee*, and puts the legal title to the amount of the loss in him, and he may sue for it in his own name.
8. Even if the assignments of the insurance policies were made to secure indebtedness, they were not void as against plaintiffs for want of registration, where the assignor and assignee were partners.
9. Discussion by SHEPHERD, J., of what constitutes a partnership.

This was a Supplementary Proceeding, heard at the August Term, 1889, of ORANGE Superior Court, before *Graves, J.*

The purpose was to subject certain moneys ($25,000) recovered in suits brought by the receiver of the defendant H. A. Reams, against some insurance companies, for loss resulting from burning some tobacco, and tried, after removal into the United States Circuit Court.

The plaintiffs in these proceedings are the judgment creditors of the defendant Reams, by judgments obtained prior to certain transactions between the defendant and one Eugene Morehead, by which he became indebted to Morehead & Company for moneys advanced under a verbal agreement that Morehead would furnish the money to pay for tobacco, for handling, rents, and all expenses attached thereto; Reams was to purchase the tobacco, give it his personal attention and time, then to take out insurance to secure Morehead & Company for the money furnished; when the tobacco was sold and closed out, the purchase money, with all expenses attached, was to be paid to him; then, if there was anything left, Reams was to have one-half for his services. Several policies of insurance were taken out and made payable, by subsequent assignment, with the assent of the companies, to "E. Morehead" and "Morehead & Co.," as their interest shall appear. The plaintiffs, judgment creditors of Reams, contended that the money recovered on the insurance policies stood in the place of the tobacco, in which Reams alone had an insurable interest, and that therefore they alone were entitled to have it subjected to their claims, and that Morehead was estopped to assert any interest therein.

The cases tried in the United States Court, consolidated in one, stated that a joint recovery was effected under an agreement that the rights of the parties to the cause should be determined under the proceedings heretofore commenced, *i. e.*, these proceedings.

The following are the facts found by the Court and judgment thereupon:

1. The plaintiffs are creditors of H. A. Reams, who had reduced their debts to judgments in the Superior Court of Orange County. The amounts are shown on the records.

2. That the said judgments remain unsatisfied.

3. That plaintiffs instituted these proceedings, supplementary to the execution, against the defendant H. A. Reams.

4. These proceedings were, by order of this Court, consolidated.

5. That Eugene Morehead was made a party, and after his death his executrix was made a party to these proceedings.

6. That at the time of the transactions hereinafter stated, H. A. Reams and Eugene Morehead were residents of the county of Durham and of the town of Durham.

7. That Eugene Morehead carried on a banking business in the town of Durham from June, 1880, to January 2, 1884, under the name of "The Banking House of Eugene Morehead."

8. After January 2, 1884, the banking business was continued by Eugene Morehead and Gerrard S. Watts, of Baltimore, under the name of "The Banking House of Eugene Morehead & Co."

9. That Henry A. Reams failed in business and became insolvent, owing, in addition to the debts of plaintiffs in these proceedings, large debts to other parties, which are still unpaid; and was insolvent at the time of the purchases of the tobacco on which the receiver collected the insurance money which is sought to be subjected to the payment of plaintiffs' debts.

10. The purchases of tobacco were made in the name of H. A. Reams, under an agreement with the said Eugene Morehead, as follows: "Morehead would furnish the money to pay for the tobacco and for the handling, rents and expenses attached thereto, and Reams was to buy the tobacco, give it his personal attention and time, take out insurance on the tobacco for Morehead's benefit, as security to him for the money furnished; when the tobacco was sold and closed out, the purchase money and all expenses attached was to be paid to him; then, if there was anything left, Reams was to have one-half of it for and in consideration of his services. This arrangement was made prior to May, 1882, and to cover any losses Reams was to deposit $500. Afterwards, in November, 1883, Reams and Morehead had a reckoning, and thereafter Reams continued to buy under the same terms, except that he was not required to make any deposit to cover losses.

11. Purchases of tobacco were from time to time made by Reams and paid by drafts on the banking house of Eugene Morehead and Eugene Morehead & Co., a separate account being kept on the books in Reams' name.

12. Tobacco thus purchased was stored in Durham and policies of insurance were taken out—which policies, with all the other documents and changes therein, are made a part of this finding of fact and accompany his statement.

13. The tobacco in store at the time it was burned was purchased by H. A. Reams between November, 1883, and January, 1885, when the fire occurred.

14. There had been no levy of execution on the tobacco. That Henry A. Reams was in possession of the tobacco bought, and exercised the rights of absolute ownership over it, such as storing it in his own name, paying storage charges by his own check, selling and shipping in his own

name, receiving pay first and depositing the money received for it in bank to his credit.

15. That in the buying and selling of this tobacco neither Henry A. Reams or Eugene Morehead, nor Eugene Morehead & Co., ever gave any notice, either verbal or written, that said Reams was not carrying on the business for himself, or that he was not the absolute owner, except the matters contained in the several policies of insurance.

16. That from November, 1883, to January 2d, 1884, said Reams procured the money to pay for the tobacco bought by checking on the banking house of Eugene Morehead, which checks were paid and charged to the account of said Reams, and interest charged said Reams on over-drafts.

17. That after January 2d, 1884, said Reams obtained some of the funds used for purchasing the tobacco by discounting with the banking house of Eugene Morehead & Co. the notes of H. A. Reams and Eugene Morehead at from 8 to 12 per cent., and the net proceeds passed to the credit of H. A. Reams.

18. That said Reams also drew two drafts, each for $5,000, upon John S. Lockhart, payable to himself, which drafts were both accepted, and they were discounted at the banking house of Eugene Morehead & Co. at a rate from 8 to 10 per cent., and the net proceeds passed to the credit of H. A. Reams, and Reams checked the same out to pay for tobacco, etc.

19. That the nature of the transactions between said Reams and Eugene Morehead and Eugene Morehead & Co. was not made public, except as the same was entered on the bank books of the bank and on the policies of insurance.

20. That Eugene Morehead and Eugene Morehead & Co. allowed said Reams to hold himself out as the owner of the tobacco purchased by him, except so far as the nature of the business was disclosed by the books of the bank and the conditions of the policies of insurance.

21. That tobacco was insured in manner shown by the several insurance policies, herewith filed, with the knowledge of said Morehead.

22. That the premiums for such insurance were paid by checks on the banking house of Eugene Morehead or Eugene Morehead & Co.

23. That the policies of insurance were intended to be taken out as they were corrected by the consent of the companies; that these corrections were made at the request of H. A. Reams about the 22d November, 1884, by placing slips or writing on the face of the said policies, "Loss payable to Eugene Morehead"; "Loss, if any, payable to Eugene Morehead"; "Loss payable to Eugene Morehead, as his interest may appear"; and for a more definite statement of facts the policies are all filed as part of this statement of facts.

25. That there was no written contract signed by the parties between said Reams and Morehead.

26. That there was no registration of any of the policies, or of any conveyance or assignment thereof.

27. That the two drafts mentioned in 18th finding of facts shall be filed herewith as a part of this statement of facts.

28. That the sum in the hands of the receiver, W. W. Fuller, is about $25,000; that sums furnished by Eugene Morehead and Eugene Morehead & Co. are found to be about $28,000.

29. That the debt due T. B. Moseley, $231, has been paid.

The Court considers, upon the facts herein declared, and adjudges that the executrix of Eugene Morehead is entitled to have the funds now in the hands of the receiver, W. W. Fuller, or at least so much thereof as may be required to repay the money furnished by Eugene Morehead, or by the banking house of Eugene Morehead & Co., for which said Morehead is liable to said banking house of Eugene Morehead & Co. It is, therefore, ordered that the said receiver pay over to the executrix of Eugene Morehead the sum to which she is declared to be entitled, if he can definitely ascertain the amount of account, and in case he cannot ascertain the amount so declared to be due to the said executrix, that then, and in that case, it be referred to the Clerk of the Superior Court of Orange County to ascertain what amount of money was furnished by Eugene Morehead and Eugene Morehead & Co. to pay for the tobacco insured, for which the receiver recovered, and when the amount is so ascertained, that the receiver pay over the same, or so much thereof as he may have funds to pay the executrix of Eugene Morehead, out of the money in his hands as receiver; and it is further ordered that the receiver report to the next term of this Court.

From which order the plaintiffs prayed an appeal, and assign as grounds of exception the following:

TO THE TENTH FINDING OF FACT.

Because his Honor refused to find the facts as requested by plaintiffs, as follows:

That in addition to the interest charged H. A. Reams for the accommodation extended him by Eugene Morehead and by Eugene Morehead & Co., he paid to Eugene Morehead one-half of the profits arising from the tobacco sold, and was to pay him one-half of the profits arising from the sale of the tobacco on hand.

Because his Honor found that H. A. Reams was to have one-half of the net profits for and in consideration of his services, whereas he should have found that one-half of the net profits were to be paid by Reams to Eugene Morehead in addition to the interest reserved for the loan of the money, and after the firm of Eugene Morehead & Co. was established, then one-half of the net profits was to be paid by Reams to

Eugene Morehead for the use of his name in obtaining the money.

Because his Honor found as a fact that Reams was to take out insurance on the tobacco for Morehead's benefit as security to him for the money furnished, whereas he should have found that Reams was the sole and absolute owner of the tobacco, as appears by the policies of insurance set out in the record.

TO THE EIGHTEENTH FINDING OF FACT.

Because his Honor did not find, as requested by the plaintiffs to do, that the proceeds of the two drafts for $5,000 each were placed to the individual credit of H. A. Reams, and that the said Reams checked upon the same to pay his individual expenses and for his own uses, as well as for the purchase of tobacco.

TO THE TWENTY-SECOND FINDING OF FACT.

Because his Honor failed to find, as requested, the additional fact that the premiums for the insurance were paid by the individual check of Reams upon his individual account at the banking house of Eugene Morehead and Eugene Morehead & Co., respectively.

TO THE TWENTY-THIRD FINDING OF FACT.

Because the evidence does not support the finding that the policies of insurance were intended to be taken out, as they were corrected, by the consent of the companies

TO THE TWENTY-FIFTH FINDING OF FACT.

Because his Honor should have found from the evidence that there was no written contract.

The plaintiffs further except because his Honor failed to find, as requested by them, that the slips were pasted upon the policies with the intent and for the purpose of securing a debt already in existence.

The plaintiffs further except to the conclusions of law, an order of his Honor, because he should have directed that so much of the money, in the hands of the receiver as is necessary for that purpose, should be paid to the plaintiffs in satisfaction of their debt.

Messrs J. B. Batchelor and *John Devereux, Jr.*, for plaintiffs.
Mr. W. A. Guthrie, for defendants.

SHEPHERD, J.: Several exceptions are made by the plaintiffs to the findings of fact by the Court below, and it is insisted that these should now be reviewed by us.

It appears from the record that the parties agreed that the Judge should find the facts, and it is well settled that where such an agreement is made the findings are conclusive. *Cooper* v. *Middleton*, 94 N. C., 86; *Vaughan* v. *Lewellyn*, 94 N. C., 472; *Barbee* v. *Green*, 92 N. C., 471; *Battle* v. *Mayo*, 102 N. C., 413.

The only exceptions that will be entertained in such cases are, that there was no evidence to support the findings; that competent or incompetent testimony was rejected or admitted, and that the Court or referee refused or failed, after request made in apt time, to pass upon some material issue or question of fact, when there was testimony tending to support the same.

Much difficulty was experienced under the Code of New York upon the last mentioned question of practice, and it is now provided by statute in that State that, "before the cause is finally submitted to the Court or referee, or within such time afterwards, and before the decision or report is rendered, as the Court or referee allows, the attorney of either party may submit in writing a statement of the facts which he deems established by the evidence and rulings upon questions of law which he desires the Court or referee to make," &c When the Court or referee refuses or fails to pass upon such facts, and the Court can see that they are material, the party making such request may, as a matter of right, have the case remanded for further findings. N. Y. C. C. P., 993.

Before this provision was made, it was held that where there was a failure "to find upon all the issues involved in the action, the appellant must, upon the settlement of the case, require (the Court or referee) to make such findings upon questions of fact as are necessary to the proper presentation of the questions of law arising thereon." *People* v. *Railroad*, 57 Barb., 209; *Manly* v. *Insurance Co.*, 1 Lans., 20; *Van Slyke* v. *Hyatt*, 46 N. Y., 259; *Smith* v. *Insurance Co.*, 62 N. Y , 85. This, we apprehend (there being no statutory regulation), is the proper practice with us, and, if it is not observed, the case will not be remanded as a matter of right, unless it clearly appears from the report that some material matter has been omitted, or that further findings are necessary to a just and intelligent disposition of the cause. *Straus* v. *Beardsley*, 79 N. C., 59; *Norment* v. *Brown*, 79 N. C., 363 Applying these principles to the case before us, we see no reason for disturbing the facts as found by his Honor. There is no exception that there was an absence of evidence to support the findings, nor that there was any improper ruling upon the admission or rejection of testimony. The exceptions are, in effect, that the Court found against the weight of testimony, which, we have seen, cannot be passed upon here. It is true that exceptions one, four, five and eight are addressed to the refusal or failure of the Court to find certain specified facts, but this by no means implies that the Court refused to consider or pass upon them at all, and this must explicitly appear before this Court can entertain such exceptions.

We must therefore consider the case upon the facts set forth in the findings of the Court and the accompanying exhibits.

The plaintiffs are the judgment creditors of H. A Reams, and the indebtedness was contracted and judgments obtained prior to the business transactions between the said Reams and Eugene Morehead. No levy was ever made upon the tobacco, the subject of the insurance, and the tobacco having been destroyed by fire, plaintiffs are seeking, by proceedings supplementary to execution, to subject the money due upon the policies of insurance to the payment of their judgments. These policies were originally payable to Reams, but in 1884, before the loss, they were, with the consent of the insurance companies, made payable—some to "Eugene Morehead"; some to "Eugene Morehead, as his interest may appear," others to "E. Morehead & Co., as their interest may appear." In these proceedings the insurance companies were summoned to appear, and they denied any liability upon the said policies. A receiver was thereupon appointed, who brought actions in the Superior Court of Durham County against the said insurance companies. In these actions Reams, Morehead, and E. Morehead & Co. were joined as plaintiffs.

All of the actions were removed to the Circuit Court of the United States where they were consolidated and tried, the plaintiffs recovering the full amount of the policies. The fruits of this recovery, some twenty-five thousand dollars, are now in the hands of the receiver, awaiting the direction of the Court in the present proceedings.

The plaintiffs contended that this money stands in the place of the tobacco; that Reams alone had an insurable interest, and that the money, being his, is subject to the payment of his indebtedness.

In support of their contention they insist that the money was recovered upon the theory that Reams was the sole owner of the tobacco, and that Morehead is estopped to claim any interest in the amount recovered. One of the defences in the Circuit Court was that Reams had made a false representation in effecting the insurance, in that he had stated that he was the sole owner of the subject of the insurance. The Court held that he was the sole owner of the tobacco, "within the meaning of the words of the policy," and the opinion seems to treat Morehead as a creditor only, holding the policy as collateral security. This much it passes upon as material to the determination of the plea of the insurance companies, but it by no means declares that Morehead is not entitled to have the amount recovered applied to the satisfaction of his claims. It does not appear what testimony was before that Court, and we are therefore unable to see whether its opinion and judgment were based upon the same facts as are presented to us. Conceding, however, that the facts were the same, it is plain that the parties to the proceeding are not estopped by the rulings of the Circuit Court upon any matter incident to the trial before it. The suit was brought upon the understanding that it was only to determine the liability of the insurance companies, leaving the other questions to be settled in these proceedings. This clearly appears from the case upon appeal, which states that "a joint recovery was effected (in the Circuit Court) under an agreement that the rights of the parties to the cause should be determined under the proceedings heretofore commenced." This express agreement frees us from any supposed estoppel growing out of the trial in the said Court, and we are, therefore, to determine the questions presented solely upon the facts found by the Judge.

As the insurance companies have no interest whatever in this controversy, much, if not all, of the law peculiar to the defence of such companies against the insured is eliminated from the case. For instance, the contention that Morehead had no technical insurable interest has no application here. The companies alone can avail themselves of such a defence, which is based entirely upon grounds of public policy, which condemns "wagering" or "gambling" policies of insurance. It is very clear to us that whatever rights the judgment creditors may have in a fund like the present (*Stamps* v. *Insurance Co.*, 77 N. C., 209), they must be pursued in equity, for the plaintiff creditors had no lien upon the tobacco, nor have they any legal interest whatever in the insurance money. On the contrary, the legal title is in Morehead and E. Morehead & Co., by reason of the assignment of the policies to them.

That such an assignment, with the consent of the company, is valid, is well settled. In *Fogg* v. *Insurance Co.*, 10 Cush., 327, Chief Justice SHAW says: "But there is another species of assignment, or transfer, it may be called, in the nature of an assignment of a chose in action. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen, upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains. The assignment and assent to it form a new and derivative contract out of the original." May on Insurance, 378.

The legal title, then, being in the assignees, under an express contract with the insurance companies, let us now examine the reasons advanced why the money recovered should be taken from such assignees and given to the plaintiffs. We will first consider the policies payable "to Eugene Morehead," and "to Eugene Morehead, as his interest may appear."

There is no suggestion that the assignment is not supported by a full and valuable consideration, nor is there any intimation of actual fraud in reference to the transaction. It is contended, however, that Morehead was only a creditor of Reams, who assigned the policies to secure his indebtedness, and that this assignment, being in the nature of a mortgage, is void as against the plaintiffs for want of registration. The discussion of this question becomes unnecessary, for the reason that we are of the opinion that Reams and Morehead were partners, in which case it is conceded that registration is not essential. It is earnestly insisted, however, that there was no partnership between these parties, and that Morehead was simply a creditor of Reams, receiving a part of the profits only as a compensation for the money lent.

We listened with great interest to the argument of the intelligent counsel for the plaintiffs. It was chiefly directed against the old principle that a participation in the profits of a business was the unvarying test of copartnership.

We are aware that this rule, as a test in all cases, has been discarded in England and in a few of the American States, and that the text-writers are gradually breaking away from it, and are endeavoring, not without confusion and conflict, to construct some new *criteria* by which the relation is to be determined.

We think, however, that even under the rule as modified in England and elsewhere, the agreement in this case would be considered as constituting a partnership.

Ever since the decision of DeGray, C. J., in 1775, in *Grace* v. *Smith*, 2 Wm. Blackstone, 998, it has been generally held that all persons who shared in the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated. The decision was subsequently approved in the leading case of *Waugh* v. *Carver*, 2 H. Blacks., 235. This seems to have been the rule, without any qualification, until an exception was made in cases where the profits were looked to as a means only of ascertaining the compensation which, under the contract, was to be paid for the services of an employee. Thus the law of England stood for nearly a century, and these general principles are still regarded in North Carolina and most of the States as the "ordinary tests" of partnership. *Jones* v. *Call*, 93 N. C., 170; *Mauney* v. *Coit*, 86 N. C., 463; *Motley* v. *Jones*, 3 Iredell's Eq., 144; *Cox* v. *Delano*, 3 Dev., 89; 2 Greenleaf Ev., 482.

No case, it seems, has yet arisen in this State in which the rule has worked such a hardship as to call for its modification, but in 1860, the House of Lords, in the case of *Cox* v. *Hickman*, considerably changed the ancient doctrine. The effect of the ruling in that case is thus stated by McKENNAN, J., in *Mechan* v. *Valentine*, 29 Fed. Rep., 276 "The rule, as determined by those two old cases (*Grace* v. *Smith* and *Waugh* v. *Carver*), was that to share in the profits was to make the sharer a partner. As I understand the decision in *Cox* v. *Hickman*, that is not altogether discarded. Participation in the profits may be, and still is, to be considered as evidence tending to establish the partnership relation, and, in the absence of any other proof, is to be regarded as sufficient to make that out. In *Cox* v. *Hickmon*, it is still admissible, and is be considered as evidence touching the alleged relation of partnership, and is sufficient, if no other evidence is offered. But, as determined in that case, it is not conclusive. Other considerations are to be considered in connection with the participation in the profits, in determining whether the partnership relation has been created or not."

To the same effect is 1 Lindley Partnership, 35, where, in speaking of the result of the decision in Cox's case, it is said "that *prima facie* the relation of principal and agent is constituted by the agreement entitling one person to share the profits made by another to an indefinite extent, but that this inference is displaced, if it appears from the whole agreement that no partnership or agency was really intended."

There is nothing in the facts of this case which requires us to make a departure from the old rule; nor is it necessary that we should attempt to lay down a new test of partnership.

Applying the rule, however, as above modified, we can find nothing in the agreement under consideration which rebuts the *prima facie* case of partnership arising out of the participation in the profits. Indeed, we think the circumstances all tend to sustain such a conclusion.

In support of the argument that the money advanced by Morehead was only a loan, the plaintiffs cited the case of *Richardson* v. *Hughitt*, 76 N. Y., 55. There was no pretence in that case but that the money was, in fact, lent by Hughitt to the firm of Bench Bros. & Co., and that he was to receive one-fourth of the net profits upon the sale of certain wagons, "with interest on the advances made at five and one-quarter per cent., so far as the cash received would go, and the balance in notes on interest at seven per cent." This was held to be a loan.

But there is a most important difference between that case and ours. There, it is apparent that the money advanced was to be repaid at all events. Its repayment was not contingent upon the success of the business. Indeed, the case expressly states that the advance was a loan, and that the agreement as to profits, &c., was simply a means of securing it and making compensation therefor.

In our case, the usual elements of partnership are present. Morehead advances the capital, and Reams is to contribute the services to the joint undertaking, which is the purchase and sale of tobacco. No personal liability is contracted by Reams for the money advanced, and the said capital is to be paid out of the partnership stock, and the balance, after the payment of expenses, &c., is to be equally divided as profits between the parties. This, in our opinion, constitutes a partnership, for Morehead, under this agreement, has a proprietary interest both in the stock and the profits.

That such a transaction is not a loan is settled, we think, by high authority. We extract the following from 1 Bates' Partnership, 49, which is well sustained by many decided cases: "What is a loan? The fact, however, that the interest expected or received is disproportionate, and the contract usurious, will not affect its construction. To constitute a loan, the money advanced must be returned, in any event, independently of the success or non-success of the business or the making of profits. If the repayment is contingent upon the profits, it is not a loan, for it is then made, not upon the personal responsibility of the borrower, but upon the security of the business."

A glance at the agreement plainly shows that the foregoing principles govern our case and are decisive against the plaintiffs' position that Morehead was only a creditor of Reams. Here, the payment, both of the capital and the compensation, was entirely dependent upon the success of the business.

It was urged on the argument that his Honor should have found that, in addition to profits, Morehead was to have interest on the money advanced. The testimony only shows that money was borrowed at interest by Morehead & Reams of Morehead & Co. This plainly does not support the contention; but, granting that Morehead was to have interest on the money advanced, this would not so affect the agreement as to change the relation of the parties. There can be no doubt that a partnership may borrow money at interest for the purpose of its business, and we can see no reason why it cannot borrow of a partner as well as of third persons.

Charging interest in such cases, where the facts are doubtful, may be very material in determining the character of the agreement, but it cannot of itself, as we have stated, change the relation of partnership to that of creditor and debtor, when the terms of the contract are ascertained, disclosing the existence of the partnership.

This view as to interest is fully supported by the charge of the learned Judge who tried the case of *Mauney* v. *Coit*, *supra*, which charge was afterwards sustained by this Court. That case was very similar to this, and on the whole question of co-partnership, is direct authority against the plaintiffs.

Our conclusion, therefore, is, that there being a partnership between Morehead and Reams, the former must be paid out of the insurance money the amount advanced by him.

As to the two policies payable to "Morehead & Co., as their interest may appear," it is only necessary to say that if the assignment is void for want of registration, the money is payable to Reams, under the original contract of insurance, and, as he was a partner of Morehead and jointly responsible to Morehead & Co. for the large amounts borrowed of them for the purposes of the business, and the insurance was upon partnership property, we can see no principle of law or equity which requires the fund to be diverted from the payment of the partnership liabilities and paid over to the individual creditors of Reams, whose debts were contracted anterior to the business transactions of Reams and Morehead.

We are, therefore, of the opinion that there was no error in the ruling of his Honor, and that the judgment must be affirmed.

Affirmed.

*THURBER, WHYLAND & CO. v. W. D. LAROQUE and wife.

Equity—Trust—Consideration—Husband and Wife—Betterments—Estoppel—Lien—Deed—Fraud—Homestead.

1. The general principle that a consideration is necessary to raise a trust, and that equity will protect against one holding the legal title, the beneficial interest of him who pays the purchase-money for property, had its origin in the old doctrine governing uses.
2. The rule that a resulting trust is raised in favor of the person who pays the purchase-money for land, though the title may be made to another, is subject to the qualification that when the person who pays the price is under legal, or even, in some instances, moral obligation to maintain the person in whose name the purchase is made, there is a presumption in equity that the purchase is intended as an advancement or gift to the recipient.
3. The relationship between husband and wife is a sufficient consideration to raise this presumption, when the former furnishes the consideration and causes the conveyance to be made to the latter; but the presumption is repelled by proof that the deed was executed to defraud the husband's creditors, whose right to subject the interest resulting in favor of the husband is subject only to his right of homestead.
4. Where the husband contracted to pay three hundred and fifty dollars for a tract of land, paid forty dollars and executed three notes, signed also by his wife, in the aggregate for three hundred and ten dollars, and caused a deed to be made for the whole to the wife, who immediately joined him in a mortgage deed to the grantor, reconveying the land to secure the payment of the notes, and she paid out of her own separate funds $150, and he $160, in addition to the $40 previously paid: *Held*, that the wife had the absolute title to three undivided sevenths, and held four undivided sevenths in trust for the husband, because he was embarrassed with debt, and that the right of the creditors was postponed only in favor of his right to a homestead.
5. In cases where the purchase-money for land is furnished by different persons, each holds an equitable interest in proportion to the amount of purchase-money paid by him, and the relative interests are not changed by the fact that one subsequently advances a sum for betterments placed on the land, in excess of his proportional interest.

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* Head-notes by AVERY, J.

6. The land in this case will not be sold and the fund arising from the sale divided, because the husband expended over eight hundred, while the wife expended only two hundred in improvements placed on the land, after the purchase.
7. The wife is not estopped, because of her silence while the improvements were being made, from denying that the creditors had a lien to the extent of the husband's expenditures for betterments, nor does the law imply a contract on her part to pay any portion of the costs of said improvements.
8. The wife cannot subject her separate real estate, or any interest therein, to any lien, except by deed, in which the husband joins, with privy examination as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her from doing directly.
9. The equitable interest of the husband, the resulting trust in four undivided sevenths, could not be sold to satisfy his creditors without allotting his homestead in it, if no homestead had been previously laid off to him, the debtor in such case being entitled to claim a homestead in the equity, as he may do where his deed conveying the legal, as well as equitable estate in the land, is set aside for fraud.

This was a CIVIL ACTION, brought by the plaintiffs, judgment creditors of the defendant W. D. LaRoque, to subject the land described in the fifteenth paragraph of the complaint, or the money expended by the said W. D. LaRoque in purchasing said land, and in placing improvements thereon, to the satisfaction of their judgments, tried by *Bynum, J.*, at the November Term, 1889, of the Superior Court of LENOIR County, upon the issues set out in the record proper.

The facts admitted and found by the jury were that the said W. D. LaRoque had contracted, by parol, on or about the 1st day of January, 1886, to purchase said land (being a lot in the town of Kinston) from one Washington, and on the 12th day of May, 1886, paid said Washington $40 in cash in part payment of the purchase-money, and at the same time executed to him three notes jointly with his wife, the *feme* defendant, for the balance of the purchase-money, and at different dates, one for $110 and two others for $100 each, making a total of $350 as the purchase-money. That, on the said 12th day of May, 1886, the said Washington, at the instance and request of the said W. D. LaRoque, conveyed the said lot of land to the *feme* defendant Annie P. LaRoque in fee, taking from the said defendants a mortgage on the land to secure the $310 unpaid purchase-money; that afterwards the said W. D. LaRoque paid $160 of the purchase money, and expended $650 in placing a residence and other permanent improvements upon the said land, all being his own money, and without any consideration therefor on the part of his said wife; that the said conveyance by the said Washington to the said Annie P. LaRoque was without any consideration upon her part moving to the said W. D. LaRoque, other than her signing the said notes of $310 and the mortgage to said Washington to secure the unpaid purchase-money; that the said Annie P. LaRoque, after the said 12th of May, 1886, paid $150 of the said purchase-money, and expended $250 in placing the said residence and improvements on said lot, all being of her own separate property; that there was allotted to the defendant W. D. LaRoque, on or about the 3d day of February, 1887, his personal property exemption, under an execution issuing upon the judgment of the plaintiff G M. Lamb & Co., set forth in the complaint, to the amount of $316; that all the judgments in the amendment to the complaint are true and correct, as therein stated; that some of the debts on which the judgments of the plaintiffs mentioned in the complaint were rendered, were contracted before the 12th of May, 1886, and all of them during the year 1886; that the house and improvements were not completed, but were being made during 1887; that the said W. D. LaRoque was insolvent at the time of the commencement of this action; that defendant W. D. LaRoque claimed his homestead in the said lot and improvements, to the extent of his interest, as shown above; that said Annie P. LaRoque claimed the property as her own, by virtue of the deed of conveyance from Washington to her.

Upon the admissions of defendants, and the verdict of the jury, as set out in the record proper, the plaintiffs moved, "upon the admission in the answer and the findings of the jury, that the land conveyed by Washington to Annie P. LaRoque be declared subject to a lien for the sum of six hundred and sixty-six dollars, the balance of the sum paid by W. D. LaRoque for the purchase of said land and in placing improvements thereon after said conveyance, to-wit, eight hundred and ten dollars, after deducting therefrom the deficiency in value of the personal property exemptions heretofore allowed him, to-wit, one hundred and eighty-four dollars; that said land be sold for the satisfaction of said sum of six hundred and twenty-six dollars, and that said sum, when realized, be applied in payment of the plaintiffs' judgments"; which motion was refused, and the plaintiffs excepted.

Plaintiffs then moved, "upon an admission and findings, that the said land be declared subject to a lien for the sum of four hundred and sixty-six dollars, the balance of the sum paid by W. D. LaRoque for the improvements on said land after said conveyance, to-wit, the sum of six hundred and fifty dollars, after deducting therefrom the deficiency in value of the personal property exemption heretofore allowed him, to-wit, one hundred and eighty-four dollars; that the land be sold for the satisfaction of said sum of four hundred and sixty-six dollars, and that said sum, when realized, be applied in payment of the plaintiffs' judgment"; which motion was refused, and the plaintiffs excepted.

The plaintiffs then moved, "upon an admission and findings, that the said land be declared subject to a lien for the sum of three hundred and ten dollars, the balance of the sum paid by W. D. LaRoque for the purchase of said land

and the improvements thereon after said conveyance, to-wit, eight hundred and ten dollars, after deducting therefrom his personal property exemption of five hundred dollars; that said land be sold for the satisfaction of said sum of three hundred and ten dollars, and that said sum, when realized, be applied in payment of the plaintiffs' judgments"; which motion was refused, and the plaintiffs excepted.

Plaintiffs then moved, "upon said admissions and findings, that the said land be declared subject to a lien for the sum of one hundred and fifty dollars, the balance of the sum paid by W. D. LaRoque for the improvements thereon after said conveyance, to-wit, six hundred and fifty dollars, after deducting therefrom his personal property exemption of five hundred dollars; that said land be sold for the satisfaction of said sum of one hundred and fifty dollars, and that said sum, when realized, be applied in payment of the plaintiffs' judgments"; which motion was refused, and plaintiffs excepted.

The Court then, on motion of the defendants' counsel, rendered judgment—

1. That the defendant Annie P. LaRoque is the owner of $\frac{400}{1250}$ of the said house and lot and improvements thereon.

2. That the defendant W. D. LaRoque was, and is, entitled to his homestead exemption, to be set apart and allotted to him and his family according to law, in the remaining interest, to-wit, $\frac{850}{1250}$ of said lot, house and improvements, against the judgments of the plaintiffs, or executions issuing thereon.

3. That the defendants recover their costs of suit, to be taxed by the Clerk.

1. The plaintiffs excepted to so much of the judgment in this case as adjudges that the defendant Annie P. LaRoque is the owner of $\frac{450}{1250}$ of the said house and lot and the improvements thereon.

2. To so much of said judgment as adjudges that the defendant W. D. LaRoque was, and is, entitled to his homestead exemption in said lot, to be set apart and allotted to him and his family according to law, in the remaining interest, to-wit, $\frac{850}{1250}$ of said lot, house and improvements, against the judgments of the plaintiffs, or executions issuing thereon.

3. To so much of said judgment as adjudges that the defendants recover of the plaintiffs their costs of the action.

4. To the judgment as a whole.

Plaintiffs appealed.

Mr. G. V. Strong, for plaintiffs.

Mr. George Rountree, for defendants.

AVERY, J.—after stating the facts: The position that no resulting trust was raised by the transaction between Washington and the defendants—husband and wife—LaRoque, for which plaintiffs' counsel contended, is untenable. The general principle that a consideration is necessary to raise a trust, and that equity will protect against one holding the legal title, the beneficial interest of him who pays the purchase-money for property, had its origin in the old doctrine governing uses *Patton* v. *Clendenin*, 3 Murph., 68; *Pegues* v. *Pegues*, 5 Iredell Eq., 418.

"When a person has in his possession money or other personal estate belonging to another, or where a title in lands is made to him, based on a consideration, the ownership whereof is in another, he holds the personal estate or the legal title to the land as trustee for the true owner." 2 Bishop Mar. W., § 119; *Moseley* v. *Moseley*, 87 N. C., 69.

The rule that a resulting trust is raised in favor of the person who pays the purchase money for land, though the title may be made to another, is subject to the qualification that where the person who pays the price is under a legal, or even, in some instances, a moral obligation to maintain the person in whose name the purchase is made, there is a presumption in equity that the purchase is intended as an advance or gift to the recipient. 2 Pom. Eq. Juris., § 1039; 2 Story's Eq., §§ 1197, 1202 and 1203; 2 Bishop M. W., § 121. The relationship between husband and wife is a sufficient consideration to raise this presumption, when the former furnishes the consideration and causes the conveyance to be made to the latter, but the presumption is repelled by proof that the deed was executed to defraud the husband's creditors, and a resulting trust arises in their favor, subject, however, in this case, to the husband's claim of homestead, if sustained. The limitation is founded upon the general principle that one must be just before he can be generous, even to his wife, and the valuable consideration which raises the trust in his favor is held to prevail against the good consideration and to make it inoperative till creditors are satisfied and only the rights of the parties remain to be considered. *Lery* v. *Griffis*, 65 N. C., 236; Perry on Trusts, §§ 148 and 149; *Guthrie* v. *Gardner*, 19 Wend., 414; *Fathern* v. *Fletcher*, 31 Miss., 265; 2 Bishop on M. W., §§ 124, 127.

The doctrine is also based upon the old principle that the equitable interest in land is drawn as if by irresistible magnetic attraction to the person who pays the price, and where it is bought with a mixed fund, the beneficial interest is divided among those who furnish it in the proportion that the amount advanced by each bears to the whole sum. 2 Pom. Eq. Jur., § 1038; 2 Bishop M. W., § 125; *Cunningham* v. *Bell*, 83 N. C., 328; *Lyon* v. *Akin*, 78 N. C., 258.

Where a fund arising from the sale of the wife's separate real estate (before it is impressed by some act of his with the character of personalty), or any other money constituting a part of her separate property, is used in the purchase of land, and the title is taken to the husband, a trust is created in favor of the wife, there being no presumption that she intended to provide for him.

In the case of *Lyon* v. *Akin, supra,* where the husband married in 1846, bought a tract of land in July, 1848, for $218, and paid $150 of said sum out of the fund arising from the sale of his wife's separate land, and subsequently conveyed the land in the year 1861 to secure a debt, and the mortgagee bought the land at foreclosure sale, it was held that the mortgagee acquired by the purchase the life estate of the husband as tenant by courtesy only. BYNUM, Justice, for the Court, said: "There is a resulting trust at his (the husband's) death to the wife (or her husband, if she does not survive him) to the extent of the purchase money she furnished." In *Cunningham* v. *Bell, supra,* Justice DILLARD announces still more explicitly the principle that the owners of the beneficial estate in land hold interests therein in proportion to their respective advancements in making up a mixed fund for the purchase. The learned Justice says: "The Judge finds as a fact that the payments on the purchase-money secured by the mortgage, so far as made, were made by the plaintiff, as agreed on by means furnished by her (the wife) or derived from her separate property, and thereby an equity arose to the plaintiff *pro tanto,* her payments, and will arise in *toto* on full payment to have the trust enforced in her favor," &c. See also *Case* v. *Codding,* 38 Cal., 191; *Smith* v. *Patton,* 12 W. Va., 541; *Smith* v. *Smith,* 85 Ill., 139; *Miller* v. *Birdsong,* 7 Baxter, 531.

The resulting trust is raised by the payment of a part, or the whole, of the purchase-money of land, and does not depend for its existence, or extent, upon the amount subsequently advanced to be expended in improvements placed upon it. An equity was raised in the present case on the ultimate payment of the whole of the price of the land in proportion to the sum paid respectively by each. The mortgage lien being discharged, the *feme* defendant held the absolute title to three undivided sevenths, by reason of having paid $150, while she held four undivided sevenths of the land in trust for the creditors of the husband, who had paid $200, subject to his claim to a homestead. The law relating to trusts looks only to the payment for the land, and the amount furnished by each, after the original agreement with Washington, for betterments is not a factor in arriving at the equitable interests of the two contributors to the mixed fund. *Francestown* v. *Duning*, 41 N. H., 442; 2 Bish. M. W., § 126; *Rogers* v. *Manning*, 3 Paige, ch. 398; *Sterne* v. *Sterne*, 5 Johns., ch. 18.

It being settled, then, that the wife, on the discharge of the mortgage debt to Washington, had an absolute estate in three undivided sevenths of the land and held four undivided sevenths in trust, two questions are still to be determined:

1. Could the husband, though insolvent at the time, by expending six hundred and fifty dollars in making improvements on the land, subject the undivided interest of the wife, paid for with her own separate funds, to liability to sale at the instance of his creditors, who seek to follow the fund so expended?

2. Was the husband deprived of the right to have his homestead allotted in the other four undivided sevenths, because, when he paid for it, he did not retain property sufficient and available to satisfy the claims then due to his creditors, or because, at best, there is a resulting trust in four sevenths liable immediately for his debts, if not primarily subject to his right of homestead

The three undivided sevenths of the land constituted a part of the separate estate of the *feme* defendant, and if it is charged with a lien for the amount expended on the premises by the husband, it must be because of an implied contract on the part of the wife to pay for them, or because she would be estopped from denying the claim of one who built the houses, or other permanent structures, without objection from her, and is, in the same way, prevented from resisting that of the creditor, or, lastly, because she is deemed, in law, a party to the fraud perpetrated by the husband, and will not be allowed to derive benefit from it.

In *Scott* v. *Battle*, 85 N. C., 185–189, the rule is laid down in reference to the wife, that "in no case will the law imply a promise on her part, and every one who deals with her is held to do so with knowledge of her liability."

Hence, she is not held liable to restore to any person money expended in improvements on her land, when the person who makes them is presumed in law to know her liability, and not be misled by the idea that she had capacity to contract, in reference to her separate estate, by implication of law. In the recent case of *Farthing* v. *Shields* (decided at this term), Justice SHEPHERD, delivering the opinion, says: "Accordingly, it has been determined that *The Code*, § 1826 requiring the written consent of the husband, in order to affect her real or personal estate, did not confer upon her (even when such written consent was given, or where the liability was for her personal expenses, &c.) the power to make a legal contract. Its object was to require the written consent of the husband, in order to charge in equity her statutory separate estate, on the same principle which requires the consent of the trustee, when the separate estate is created by deed of settlement. *Pippen* v. *Wesson*, 74 N. C., 437; *Flaum* v. *Wallace*, 103 N. C, 296. In the light of these and other decisions, the section should read as follows: 'No woman, during her coverture, shall be capable of making any engagement in the nature of an executory contract, by which her statutory real or personal estate is to be charged in equity, without the written consent of her husband. But where the consideration is for her necessary personal expenses, or for the support of her family, or where it is necessary, in order to pay her ante-nuptial indebtedness, she may so charge such real or personal estate, without such consent of her husband.' But in view of the express requirement of law that the husband and the wife shall join, with privy examination of the latter, in aliening an interest in real property, the foregoing construction of the section is, in the same case, modified in its application to the separate real estate of the wife, and the Court say that the wife's 'power to charge her separate real estate by an engagement in the nature of a contract, is measured and limited by her power to dispose of the same, and it must follow that if the wife, with the written consent of her husband, had expressly charged her statutory separate real estate, it would have been of no avail without privy examination.'"

She cannot, therefore, subject her land, or any separate interest therein, to a lien in any possible way but by a regular conveyance, executed according to the requirements of the statute, and the law will not allow her to dispense with these necessary forms and accomplish what she is prohibited from doing directly, by a silence that will estop her or prevent her from enjoying the benefit of the enhanced value of her interest because she is supposed to have been a participant in the fraud of her husband. In *Lambert* v. *Kinnery*, 74 N. C., 348, and in *Littlejohn* v *Egerton*, 76 N. C., 468, this Court held, in effect, that a debtor could not evade the law and pass his right to a homestead by any act that amounted to an estoppel in *pais*, and that he could not waive it in any way in favor of his creditors "except by a deed in which the wife should join, with privy examination." *Hughes* v. *Hodges*, 102 N. C., 236–244. Neither can we concur in the view that the fraud of the husband in expending money which justly belonged to his creditors, and the silence of the wife (even if she had known his pecuniary condition, which does not positively appear), shall have the force and effect of subjecting the wife's interest to sale, when we have said that no charge or lien upon it could be created except by deed proven in the regular mode. *Farthing* v. *Shields*, *supra*

It must be remembered that the land was conveyed to the *feme* defendant on the 12th of May, 1886, and immediately subjected to the lien of a mortgage deed in which she joined her husband to secure the three notes for the residue of the purchase-money. Some of the debts due the plaintiffs' judgment creditors, were contracted before that deed and mortgage were made, while all of them were created during the year 1886. The house and improvements were not completed, but were being constructed during the year 1887. It does not appear that the wife knew that the husband was insolvent, or, indeed, owed any debt except the notes payable to Washington signed by both. She expended of her own means one hundred and fifty dollars of the purchase-money, and two hundred and fifty in improvements, the creditors sitting idly by with notice of the nature of the deed and mortgage, and with power at any time to institute against the husband proceedings supplementary to execution, since it appears that all, or nearly all, of the judgments were rendered and docketed in the year 1886, before any money was expended in betterments. We see, therefore, no peculiar hardship in protecting the rights of the *feme* covert against the probable sacrifice of what she has expended on an incomplete house; but, whether the creditors are made to suffer or not, we must adhere to the interpretation placed upon our statutes. In *Farthing* v. *Shields*, the Court said, in reference to the rights of the wife: "As to her not being privileged to commit fraud, there can no fraud grow out of the contract of a married woman. It stands upon its own strength, both in law and equity. If perfect, then well and good; if imperfect, it is an absolute nullity." *Fisher* v. *Towles*, 77 N. C., 438.

So no one should be misled by the conduct of a married woman. He should recollect that she cannot incur liability amounting to a lien on her land, indirectly or directly, and take measures for his own protection accordingly. We are aware that the decisions in some of the States, two of which were cited and another examined by us, are in apparent conflict with the views we have expressed. It is our duty to construe our statutes and endeavor to make our own interpretations, in the different phases in which we apply them, harmonize. These differences among the Courts often grow out of the varying provisions of the laws of the different States. Cord (in his work on the Legal and Equitable Rights of Married Women, vol. 2, sec. 1287,) stated the principle as follows: "Where the wife has not the power to contract, she cannot by any act of hers estop herself as to her title or right, not even her assent to the gift or dedication of her land for the use of a railroad, by her husband. * * * She could only dispose of or encumber it in the way prescribed by statute. And what she could not deprive herself of by direct and express contract with the defendant, we think it clear that she could not lose by the indirect method of an estoppel in *pais*." *Todd* v. *Pittsburg, &c., Railroad Co.*, 19 Ohio, 514.

Whether the rule, ordinarily applied in transactions between men with reference to fraudulent deceptions, can be made to operate as to married women in any case, without giving an indirect opportunity to alien or encumber, contrary to the statute or not, it is certain that her simple silence in this case, without proof of participation in the fraud, or her failure to prevent her husband from building on the land, does not, according to any adjudication of this Court, work an estoppel or create an encumbrance for which the wife's interest can be subjected to sale. See *Weathersbee* v. *Farrar*, 97 N. C., 106; *Loftin* v. *Crossland*, 94 N. C., 76, *Burns* v. *McGregor*, 90 N. C., 222; *Towles* v. *Fisher*, 77 N. C., 437; *Rencher* v. *Wynne*, 86 N. C., 268; *Clark* v. *Hay*, 98 N. C., 424; *Boyd* v. *Turpin*, 94 N. C., 137.

It has been settled that if the wife refuses to perfect the title to land taken in exchange by another for land vested in her, she will be held bound to carry out the trade by paying the difference in price. *Burns* v. *McGregor*, *supra.* But while equity can, by refusing its aid, or otherwise, and will prevent a *feme covert* from taking an unconscientious advantage, it cannot give to her acts the effect of repealing a statute.

It was held in *Commissioners* v. *Bennett*, 68 N. C., 494, that a debtor who attempted to convey his land to defraud his creditors did not thereby forfeit his right to a homestead, when the creditor caused the fraudulent deed to be declared void; and, in subsequent adjudications, this ruling has been repeatedly approved, either directly or by implication. *Whitehead* v. *Spivey*, 103 N. C., 66; *Burton* v. *Spiers*, 87 N. C., 87; *Duvall* v. *Rollins*, 71 N. C., 218; *Lambert* v. *Kinnery*, 74 N. C., 348; *Gaster* v. *Hardie*, 75 N. C., 460.

In *Dortch* v. *Benton*, 98 N. C., 190, this Court held that a purchaser of land under an executory contract of sale, who had paid a part of the purchase-money, became immediately the equitable owner of the land, subject to the lien of the purchase-money due, and was entitled to have his homestead allotted in the land. The ruling in that is drawn in question in the discussion of the present case. Pomeroy (in his work on Equity Jurisprudence, vol. 1, § 372) says, in reference to the interest of vendor and vendee: "If the contract is made upon an actual valuable consideration, and complies in other respects with the requisites prescribed by equity, then, as soon as it is executed and delivered, the vendee acquires an equitable estate in the land, subject simply to a lien in favor of the seller as security for the payment of the price, while the vendor becomes equitable owner of the purchase-money. There is in this case, as in the last, an equitable conversion. The vendee's interest is at once converted into realty, with its features and incidents, while the vendor's interest is, to the same extent, personal estate."

In *Gaster* v. *Hardie*, 75 N. C., 460–461, BYNUM, J., says: "For it is well settled that, as between the debtor and the creditor, the former is entitled to his exemption, whether he has made no conveyance of his property at all, or has made one fraudulent as to his creditors. It is equally well settled that the debtor is entitled to the homestead in an equity of redemption in lands only subject to mortgage debt."

In a case not unlike the present, the Supreme Court of Illinois held that an insolvent debtor would not be deprived of the benefit of the homestead exemption where he purchased the property with his own money, merely because he procured the title to be vested in his wife. *Chipperly* v. *Rhodes,* 53 Ill., 350. This view of the law was sustained by DILLARD, C. J., in *Cox* v. *Wilder*, 11 Wis., 114

In *Rooks* v. *Hoke,* 3 Lea (Tenn.), 302, it was held that where a husband voluntarily conveys land to his wife to hinder and delay his creditors, the right of homestead was not defeated. See also *Boynton* v. *McNeill*, 31 Grattan, 456; Thompson on Homestead, § 331.

The case of *Hixon* v. *George*, 18 Kansas, 253, was one in which an insolvent debtor expended his money for land, took the title in the wife's name, and constructed improvements on the land with his own means, and yet the Court sustained his claim to a homestead in the land.

If a mortgagor can claim a homestead in an equity of redemption, the legal estate being in the mortgagee, as this Court has held, the objection that a homestead cannot be assigned in a mere equity will not lie, and if the interest of a vendee is in equity, the ownership of land, a resulting trust, must be also an equitable estate. If the objection be based upon the idea that, as between husband and wife, the presumption is that the purchase-money for land, to which title was made to her by direction of the former, was advanced for her benefit, and until the creditors move, the whole estate, legal and equitable, is in her, the reply is, that just in the same way every conveyance made to defraud creditors is good *inter partes.* So that if any fraudulent grantor is entitled to a homestead after his conveyance is declared void by the Courts, the same reasoning must make it lawful to allow a homestead to be allotted in cases like the present.

We conclude, therefore, that a homestead should be allotted in the equitable estate in four undivided sevenths of the land, and that the wife is the owner of three undivided sevenths. The judgment below must be modified accordingly. Neither of the parties can recover costs in this Court.

Judgment modified.

SHEPHERD, J.—dissenting: I am unable to concur in that part of the opinion which declares that the defendant W. D. LaRoque is entitled to a homestead exemption. Neither can I agree that the equitable relief sought in this action is based upon the idea that there is a resulting trust in favor of either the debtor or creditor.

The proposition is, that if an insolvent husband purchases land with his own money, and, for the purpose of defrauding his creditors, procures the title to be made to his wife, he is, as against creditors, seeking to subject the fund so fraudulently withdrawn, entitled to a homestead exemption of one thousand dollars.

The authorities cited from Virginia, Tennessee and Thompson on Homestead, are where the legal title was in the debtor and fraudulently conveyed by him. They stand upon the same principle as *Crummen* v. *Bennett*, 68 N. C., 494, which is based upon the ground that the fraud of the debtor has been ineffectual to change his relation to the property, and for that reason he is entitled to a homestead. It is plain that such authority has no application where the debtor never had the legal title, and if it can be used at all in a case like the present, it tends to show that only the personal property exemption can be allowed the debtor since, if the transaction is void for fraud, the investment fails, leaving the money impressed with the usual characteristics and incidents of personal property.

The Kansas case only decides that the debtor is entitled to the homestead as against subsequent creditors, and this, together with the Illinois and Wisconsin cases, is founded upon the peculiar laws governing the homestead in those States. Any one who reads a work on homestead exemptions cannot fail to be struck with the infinite variety of laws upon the subject, and the consequent conflict of the decisions of the Courts of the various States. Mr. Thompson, in his preface to his work on Homestead Exemptions, well says that "the result is a confused and almost inexplicable system, indicative of different intentions, theories and designs on the part of the law-makers, with regard to the practical application of the law, expressed generally without any very successful attempt at the definition of terms or manifestation of meaning and purpose. The inevitable consequence is a conflict of judicial construction and interpretation, but a pretty general agreement of the Courts and the legal profession in sentiments of disgust for the unsatisfactory and uncertain conditions of this department of jurisprudence." How, after this candid expression of the eminent author, any weight can be attached to such decisions outside of their own States, I am at a loss to understand. Especially is this true when such decisions are utterly inconsistent with the old and well settled principles applicable to the fraudulent acts of insolvent debtors, the effect of such transactions in reference to their property, and the principles governing the remedies which must be pursued by the creditors.

It is but natural, therefore, that the Court should place but little reliance upon such authorities, and endeavor to base its ruling upon some rational theory in harmony with the principles of law and equity as uniformly expounded by the jurists of this State. This it has sought to do by placing the decision upon the ground that the debtor has some interest in the land which he has fraudulently procured to be conveyed to the wife. It is upon this theory that *Dortch* v. *Benton* was decided, the Court resting its opinion upon the idea that the husband had acquired an equitable estate by a valid contract of purchase. Whatever may be the facts of that case, it is clear that this is the principle of the decision.

This principle of an equitable estate in the debtor is a safe one, if sustained by the facts, and it is manifest from the concluding part of the opinion in this case that the decision is grounded upon that theory alone. It is too plain for argument that the husband has no such equity by reason of his being a vendee under a contract of sale, for, at the very time he made his first payment, the title was made to the wife, and, previously, he had nothing whatever but the bare parol agreement of the owner, Washington, that he would sell him the land at a certain price. So far from having any estate, he did not have even a mere right in equity. Another reason why this view cannot be sustained is, that he never paid any money under such parol contract, but the money sought to be subjected was all paid at the time of, or subsequent to, the conveyance to the wife. Moreover, it would be absurd to say that the husband can be a vendee under an executory contract, while, at the same time, his wife is holding the land under an executed contract, made, at his instance, by the same vendor. It must follow, therefore, that, if the said defendant has any interest at all in the land, it must be by virtue of a resulting trust. And this seems to be the view of the Court. This resulting trust is finely said to be "based upon the idea that the equitable interest in land is drawn as if by irresistible magnetic attraction to the person who pays the price." This magnetism, however, is powerless in the present case, and so far from any equitable interest being attracted to the insolvent husband, it is, under the circumstances, absolutely repelled and driven beyond his reach.

There are two reasons for this. One is, because the money paid is presumed to be an advancement to the wife. In such case, there can, in the absence of evidence to the contrary, be no resulting trust. This is too plain to require the citation of authority, and is conceded in the opinion of the Court. The other reason is, that the transaction being fraudulent, "equity will not assist the perpetrator of the fraud, and consequently will decline to enforce the trust, which would otherwise result, were the transaction a *bona fide* one, for his benefit." Bispham's Eq., 124; *Page* v. *Goodman*, 8 Ired. Eq., 16; *Rhem* v. *Tull*, 13 Ired., 57; *Gowing* v. *Rich*, 1 Ired., 553; *Dobson* v. *Erwin*, 1 D. & B., 569. It being conclusively settled, then, that there can be no resulting trust for the husband, it is finally insisted that a trust results in favor of the creditors.

This is the law in New York, Minnesota, Wisconsin, Kansas, Indiana, Kentucky and perhaps other States; but this is only by reason of statutes expressly providing that such a trust shall result for the benefit of the creditors. Pom. Eq., 1042; Tiedman Real Property, 500, notes.

In some States it is even held that the interest of the fraudulent debtor in such a case may be sold under execution. That no such trust results to a creditor, and that equity does not assist him upon any such principle, is so well settled by the decisions of this Court, as well as the textbooks, that it is a matter of surprise to me that there can be the least doubt upon the subject. In the leading and instructive case of *Dobson* v. *Erwin*, *supra*, RUFFIN, C. J., says: "The debtor himself, then, could not claim a reconveyance upon the foot of such a trust. It is not deemed a valid trust fit to be executed in a Court of Equity. For the same reason, one claiming as a creditor of the debtor, could not insist on it, by way of affirming the alleged agreement and asking the execution of the trust. The Court does not recognize any such trust for the purpose of enforcing it, as such, in favor of any person, because, if it existed, it is covinous and avoids the deed itself. *A creditor cannot, therefore, be relieved upon a bill which supposes the existence and validity of such a trust* * * * So, on the other hand, as we think clear, there can be no such trust, and relief in equity would be founded, *not on it*, but on a ground entirely different, namely, the fraudulent intent to withdraw the debtor's estate from his creditors."

The remedy, says the same distinguished jurist, in *Gowing* v. *Rich*, *supra*, is founded on "the right in equity *to follow the funds* of the debtor." To the same effect is *Rhem* v. *Tull*, *supra*, in which PEARSON, J., says: "In fact it could not, as a trust, be recognized in favor of any person; a Court of Equity could not recognize and enforce it as a trust, even in favor of a creditor." So in *Wall* v. *Fairley*, 77 N. C., 105–107, RODMAN, J., says that the words "real property" cannot be construed to cover land in which the defendant never had any estate or right, and as to which his creditors have only a right in equity to follow a *personal fund* which has been converted into the land as a gift to his children, and in fraud of them." This language is quoted with approval by DILLARD, J., in *Dixon* v. *Dixon*, 81 N. C., 323–324, who then proceeds as follows: "But in the case of a suit to reach the funds of a debtor not capable of being applied under an execution, as in this action, to reach the money of the judgment debtor vested in the land conveyed to the wife, there is no lien by the judgment or execution, and the jurisdiction arises because there is no lien and the action, when instituted, at most, is looked on as one to follow the funds of the debtor."

The consensus of judicial opinion, therefore, is that in a case like ours there can be no resulting trust, either in favor of the debtor or the creditor, and that the purchase-money paid by the husband can be followed into the land as a personal fund only.

These principles being so abundantly established, I am at a loss to conceive by what judicial magic this personal fund, which has been, and can *only* be, followed as such, is, at the moment it comes within the reach of the creditor impressed with the character of realty and protected by the homestead exemption. There is nothing in the Constitution which authorizes such a doctrine On the contrary, the distinction between real and personal property in respect to exemptions is there expressly recognized in the different amounts allowed the debtor in each species of property, and I can find nothing in that instrument which in the slightest degree alters the well-settled principles by which real and personal estate is to be distinguished.

The debtor, then, having no equitable estate by reason of his mere verbal agreement to purchase, and there being no resulting trust either in his favor or in that of his creditor, it must follow that he has no equitable interest whatever in the land, as such, which can be asserted by or through him. The purchase-money, therefore, is treated as a personal fund fraudulently withdrawn from his creditors. Being followed only as such personal fund, it must necessarily be treated as such to the end. This being so, the debtor would be entitled only to the personal property exemption.

In conclusion, I will add that, even if there were no creditors, and the conveyance had been made to a stranger, there could only be a resulting trust to the extent of the forty dollars paid at the time of the conveyance. Here, all of the money, except this small amount, was paid sometime after the conveyance was executed. In order to constitute a resulting trust, "the consideration must be paid by the person claiming the resulting trust at the time of the transaction of sale or conveyance. Any subsequent payment of the consideration by such person, even though he has been compelled to do so as surety of the grantee, will not raise a trust." Tiedman on Real Prop., 500; Adams' Equity, 7 ed., 33, note.

Believing, as I do, that the ruling of the Court is based upon reasoning wholly inconsistent with the clear and well-defined distinction and principles so thoughtfully elaborated and interwoven into our jurisprudence by the great judicial minds of the past, and that a departure from them can only result in confusion and incongruities, I have been constrained to enter my dissent, and to state some of the reasons upon which it is founded.

S. R. HORNE v. J. W. SMITH et al.

Fixtures—Practice—Counter-case on Appeal.

1. Where it appears that an engine and boiler were in a shed attached to a main building, connected with and used to operate a saw-mill, attached to the land in the usual way, the engine being supplied with water from a pond made for the purpose, the saw-mill, engine and boiler are fixtures, and pass by a deed to the land.
2. As between vendor and vendee of land, the intent of the owner of the land, when he placed the saw-mill, engine and boiler upon it, is not competent to vary the terms of the deed.
3. An appellee may serve a "counter-case" to the "case on appeal," served by the appellant, instead of specific exceptions.

Civil action, tried before *Graves, J.*, at February Term, 1889, of Wake Superior Court.

There was a verdict in favor of the defendants, and from the judgment rendered thereon the plaintiff appealed.

Messrs. J. B. Batchelor and *S. G. Ryan*, for the plaintiff.
Messrs. C. M. Busbee and *W. W. Fuller*, for defendants.

CLARK, J.: The plaintiff bought the engine, boiler and saw-mill under an execution against C. J. Green. C. J. Green had executed, prior to said judgment and execution, a deed in trust to the tract of land upon which the said engine, boiler and saw mill were located. At the trustee's sale, which was also prior to said execution, the defendants purchased the said tract of land. Neither in the deed from C. J. Green to the trustee, nor from the trustee to the defendants, was there any reservation of, nor any words indicating any intention to reserve, the engine, boiler and saw-mill from passing by the conveyance of the freehold.

The Court instructed the jury: "If there was a two-story building put on the ground in the usual way in an excavation made therefor, and there was a grist-mill put therein, and an engine and boiler in a shed attached to the main building, connected with and used to operate a saw-mill attached to the land in the usual way, and the engine was supplied with water from a pond made for the purpose, then the saw-mill and engine and boilers were fixtures to the land, and the deed of Calvin J. Green conveyed them, and they passed by the sale of the trustee and his deed to the defendants." To this the plaintiff excepted.

There had been much argument about the question of whether the property was a fixture passing with the land by deed, and many authorities read, and, in order to explain the matter more fully to the jury, the Court went on to say: "There are instances in which fixtures attached to the land may still remain as personal property. For the encouragement of trade and manufacturing, and for the convenience of business, the law allows tenants, and all persons occupying the land of another, by his consent, to erect any building and to attach any machinery as they may think proper, and gives them the right to remove such buildings or machines. But here this relation does not exist. We have here a man owning the land and owning the mill, and the fixtures pass with the land." The plaintiff excepted.

On the argument, much stress was laid on Green's supposed intention to regard the mill and engine as personal property, and the Court instructed the jury further:

"The question of Green's intent is to be governed by the deed, and he, and those claiming under him, are not allowed to show any other intent. There is no exception in the deed." To this plaintiff excepted.

There were numerous exceptions taken on the trial, but they are all substantially embraced in the exceptions to the above instructions.

"It is a well settled principle of common law that everything which is annexed to the freehold becomes part of the realty. Although, when the ownership of the land and of the chattel is vested in the same person, or when the owners of both concur in a common purpose, the presumption that a chattel is made part of the land by being affixed to it may be rebutted, yet the evidence must, as it would seem, be in writing, under the statute of frauds, or else consist of facts and circumstances of a nature to render a writing unnecessary, by giving birth to an equity or an equitable estoppel." *Elwes* v. *Mawes*, 2 Smith Leading Cases, note, p. 267, and numerous cases there cited.

The witness for plaintiff had testified that the shelter over engine and boiler was "planked up on each side and length, and planked up and down, open for belt to pass to work in the house; house covered with boards two feet long, nailed on." and that saw-mill was put down in usual manner. It was impossible for purchaser of such property to remove it without disturbing the freehold by tearing up the soil, or removing in part, at least, the building erected over the engine and boiler, and becoming a trespasser. The authorities are uniform that property, such as above, affixed and used as described by plaintiff's witnesses, as well as by defendants', were fixtures. *Latham* v. *Blakely*, 70 N. C., 368; *Bond* v. *Coke*, 71 N. C., 97; *Treadway* v. *Sharon*, 9 Nev., 37; *Pea* v. *Pea*, 35 Ind., 387; *VanNess* v. *Packard*, 2 Pet., 137; *Bryan* v. *Lawrence*, 5 Jones, 337; certainly as between vendor and vendee, *McCreary* v. *Osborne*, 9 Cal., 119; Tyler on Fixtures, 519.

There are cases, arising generally between landlord and tenant, when the intent with which the articles were affixed to the freehold is a material inquiry. But those cases have no application here. As between landlord and tenant, if it appear that articles of personal property affixed to the freehold were so placed for the better temporary use of the realty, they may be treated as "trade fixtures." The intent with which they were so placed, then, becomes material. *Railroad* v. *Deal*, 90 N. C., 110. But as between vendor and vendee, the common law that articles of personalty affixed to the freehold are a part of the realty, and pass by a conveyance of the latter, is enforced in full vigor.

In *Bond* v. *Coke*, *supra*, BYNUM, J., says: "The deed, in our case, containing no exception of the gin and press, the legal effect of it is to pass them to the defendant, and no parol evidence to the contrary is admissible. The exception of them at the sale (as there alleged) being an agreement touching the sale of interest in lands, the statute of frauds requires it to be in writing. And even if the agreement reserving the gin and press had been in writing, it could only be set up by a bill in equity to reform the deed, on the ground of accident or mistake in the draughtsman." And in same case: "Personal chattels which have become fixtures are incorporated in and are a part of the land, as much so as a house or tree, until an *actual* severance, and, therefore, a deed conveying the land without excepting therein the fixtures, has the legal effect of passing the gin or press, which are part and parcel of the land."

In *Moore* v. *Valentine*, 77 N. C., 188, PEARSON, C. J., says: "A steam-engine annexed to the soil and used as a part of the freehold becomes a part of the land, and cannot be severed (even by a tenant) except in special cases."

In *Bryan* v. *Lawrence*, 5 Jones, 337, it is held that rough plank put in a gin-house to spread cotton-seed upon, though not nailed down, passed, as a fixture, with the land. But it is needless to multiply cases, or go into the nice learning as to what, in dubious cases, are or are not fixtures. Sufficient to say that the articles here, placed and used as they were, are clearly fixtures. The rules which, notwithstanding that fact, would entitle a tenant to remove them as trade fixtures by showing the intent or purpose with which they are affixed, are not competent, as between vendor and vendee, to vary a deed conveying the land without reserving them. We think, therefore, that the instructions complained of are correct. The plaintiffs, who bought under execution against Green, can have no higher or better right than he had, and he could not be allowed, as against defendants, to show that property so affixed and used with the freehold was not intended by him to be fixtures, nor that he did not intend to include them in the deed, without the allegation of fraud or mistake."

After the jury had retired for their deliberations, and had been out for a long time, the jury sent the officer in charge to the presiding Judge to ask him to come to the court-room, and at their bequest he went. It was late at night. The jury asked for further instructions. Said they could not agree. The presiding Judge inquired if the parties were in Court. They were not then. Then the presiding Judge inquired for the counsel, and was informed by the officers of the Court that they did not know where one of them was to be found, and that the other lived in the city some distance from the court-house.

The weather was inclement, and the presiding Judge desired to relieve the jury, and he did, in the absence of plaintiff and his attorneys, give further instructions, reiterating orally the substance of the instructions already given, about as follows:

"If the jury shall find that the engine and boiler and saw-mill were located, in the manner described by the witnesses, on the land of C. J. Green, at the time of the execution of the deed in trust to J. A. Long, the title passed from Green to Long, and by Long's deed to the defendants, and in that case they should find for the defendants."

And plaintiff excepts to the charge thus given, and also excepts that it was given in the absence of plaintiff and his counsel.

This charge is but a statement in a succinct form of what had been given before.

As we have said, property so affixed and used as here, clearly falls within the rules which constitute a fixture. Not coming within the exception above stated, which might take it out of the rule, this instruction was entirely correct, and might have been given earlier. The exception as to giving the instruction asked by the jury in the absence of plaintiff and his counsel, was properly abandoned in this Court. The instruction being set out, the Court can see that the defendant was not prejudiced. The propriety of taking such a course must always be left largely to the discretion of the presiding Judge. *State* v. *Jones*, 91 N. C., 654. In this case the discretion was in no wise abused. The appellee did not file specific exceptions to appellant's statement of case on appeal, but in lieu thereof served a counter-case. This has been held a compliance with the statute. *State* v. *Gooch*, 94 N. C., 982. It is very usual practice, and is often the most practicable mode of presenting the appellee's objections.

Judgment affirmed.

LEWIS COLEMAN v. D. W. FULLER.

Guaranty—Statute of Limitations.

1. The contract of a guarantor is a separate and distinct obligation from that of the principal debtor, and it is immaterial that the guaranty is written upon the same paper as the original obligation. His liability is not that of a surety.
2. An action upon a guaranty under seal is not barred until ten years after the cause of action accrues.

(DAVIS, J., dissenting.)

CIVIL ACTION, originally begun before a Justice of the Peace, tried at Fall Term, 1889, of JOHNSTON Superior Court, before *Armfield, J.*

A jury trial was waived and the case heard by the Court.

Plaintiff sued on the following bond and guaranty:

"$100. SMITHFIELD, N. C., Sept. 27, 1881.

"Twelve months after the completion of the Midland North Carolina Railway from Goldsboro to Smithfield, and the arrival of the first train at the depot, within three-fourths of a mile of the court-house at Smithfield, I promise to pay W. J. Best, President of said Railway Company one hundred dollars, with interest from the date of said completion, in consideration of the running of said road to or near Smithfield.

(Signed) "J. E. EARP." [Seal.]

"I guarantee payment of the foregoing bond, September 27, 1881.

(Signed) "D. W. FULLER." [Seal.]

It was admitted that the road was completed from Goldsboro to Smithfield on the 12th of July, 1882, and that the first train arrived at a depot within three-fourths of a mile of the court-house at Smithfield on said day.

The only contention was whether the action is barred as to D. W. Fuller.

His Honor ruled that it was, and gave judgment against plaintiff for costs. Plaintiff excepted and appealed.

Mr. R. O. Burton, for plaintiff

Mr. C. M. Busbee, for defendant.

SHEPHERD, J.: The single question presented in this appeal is whether the action is barred, as to the defendant Fuller, by the statute of limitations.

The Code, §152, par. 2, provides that "an action upon a sealed instrument against the principal thereto must be commenced within ten years after the cause of action accrues."

The guaranty executed by the defendant Fuller is under seal, and is written at the foot of the bond which was executed by the defendant Earp.

It is contended by Fuller, the appellant, that he is not a principal to "a sealed instrument" within the above provision of *The Code*, but that he is simply a surety to the bond, and, as such, is within the principle of *Welfare* v. *Thompson*, 83 N. C., 276, and other similar decisions which apply the three-years' statute of limitations.

This leads us, therefore, to the consideration of the nature and liability of the contract of guaranty. A guaranty is a contract in and of itself, but it also has relation to some other contract or obligation with reference to which it is collateral. Anderson Law Dict.; *Carpenter* v. *Wall*, 4 Dev. & Bat., 144.

"A surety is bound with his principal as an original promissor. * * * On the other hand, the contract of a guarantor is his own *separate contract.* * * * It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and not merely an engagement, jointly, with the principal to do the thing." Baylies' Sureties and Guarantors, 4 A "guarantor is not an endorser or surety." 2 Rand Com. Paper, § 849. "The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it. * * * But the guarantor's debt is always to pay the debt of another, * * * but he 'is not an endorser nor a surety.'" 2 Parsons' Notes and Bills, 117–118. "A guaranty is a special contract, and the guarantor is not in any sense a party to the note." *Lamorieux* v. *Hewit*, 5 Wend , 307; *Ellis* v. *Brown*, 6 Barb., 282; *Miller* v. *Gaston*, 2 Hill, 188–190; Story on Prom. Notes, § 3. It is a special contract, and must be specially declared on. 1 Chit., p. 1; Baylies, *supra*, 4.

These authorities very abundantly show that the contract of a guarantor is a separate and distinct obligation. Fuller is no party to the bond of Earp, and, as to his contract of guaranty, he cannot be regarded otherwise than as principal. If this were not so, we would have the anomaly of a contract with only one contracting party.

It is said, however, that there is a distinction, growing out of the fact that the guaranty is written upon the same paper as the bond. This does not in the least alter the character of the obligation. *Lamorieux* v. *Hewit, supra.* "The engagement or contract of guaranty may be, and often is, written on the back of the note or bill, but it may as well, so far as the guaranty is concerned, be written on a separate piece of paper." 2 Parsons, *supra*, 119. This feature becomes material only upon questions arising upon the negotiability or assignment of such contracts. No such questions are involved in this appeal.

We conclude that Fuller is not a surety to the bond, but a principal to the guaranty—"a sealed instrument"—and, this being a separate contract, the suit is not barred until ten years after the cause of action accrued.

Per Curiam. Error.

DAVIS, J.—dissenting: At the bottom of Earp's note or bond, is the following:

"I guarantee payment of the foregoing bond. Sept. 27th, 1881.

(Signed) "D. W. FULLER." [Seal]

There is only one promise to pay, and that is by Earp to Best. Earp is, unquestionably, the only *principal* to that obligation. Fuller guarantees the payment, and that, it is said, is a distinct undertaking—a special contract—to which he is *principal.* But the guarantee itself is only for the payment of the debt which Earp, the *principal,* has promised to pay, and is not a primary obligation. Earp is *principal* to the thing *guaranteed,* and if you eliminate his promise, Fuller was promised to do nothing. He is not primarily liable for the debt. He is not the *principal* to any promise to pay money. He is not the *principal* in the one, and only one, "sealed instrument" promising to pay money, and if he is to be held liable on a separate and independent contract or undertaking, then there was a collateral security, and, as insisted in the answer, as it was by Mr. Busbee in his argument, it was not assignable.

We are construing the instrument in view of a statute, which, it seems to me, was plainly intended to limit only the liability of the "*principal*" to a contract under seal to ten years, and to limit the liability of all persons secondarily liable, whether under seal or not, to three years. It seems to me that there was only *one principal* to the obligation to pay Best the $100, and that *principal* was Earp. I am not sure that a guarantor is ever called a *principal,* as to the thing guaranteed to be done, and whether you call him *guarantor* or surety to the original and *principal* obligation, I think neither the spirit nor the letter of section 152, subsec. 2, of *The Code,* makes him "principal thereto."

Judge DANIEL says: "A guaranty is a promise to answer the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself, in the first instance, liable to such payment or performance." *Carpenter* v. *Wall,* 4 D. & B., 144 I think this *other person* is everywhere, and in all cases, spoken of as the *principal.* I do not think a case can be found in which the *guarantor* for the payment of another is spoken of as *principal.* It is said that the contract of guaranty is co-extensive with that of the *principal.* The answer is, so is that of any other *surety* under seal, but for our *statute*—and it is that which makes the distinction between the limit of the liability of the principal and the *person bound* to answer for him—whether as surety or (I think) guarantor, for the judgment.

Baylus on Surety and Guaranty, throughout, speaks of the relation between the parties as surety and *principal,* guarantor and *principal,* and of *contracts* of guaranty and *contracts* of surety, and he also says that "if the guaranty is made with one person it cannot be extended to another." Sections 146, 113, 133, 147.

Would not Fuller, in an action against him and Best, or against him and Best's assignee, be entitled to the benefits of §§ 2100 and 2101 of *The Code?* Would he not have the right to show in what relation he stood to the parties, and that he was only surety for the payment of the $100, and that it was so understood by the parties? That he was not principal? *Welfare* v. *Thompson,* 83 N. C., 276; *Lowder* v. *Noding,* 8 Ired. Eq., 208. I think that in this case it sufficiently appears that the guarantor, as is often the case in single guaranties for the payment of money by another, is really a surety, and only a surety, for the *principal;* and if that were not the fair and necessary construction of the instrument, he would have a right to show that it was so intended and so understood by the parties, and that he would have the right to show this by parol. *Welfare* v. *Thompson, supra.*

I think there was no error in the ruling of the Judge below.

JAMES B. ALLEN v. THOMAS O. SALLINGER.

Petition to Rehear—Practice—Contradictory Verdict.

Where the plaintiff, in an action to recover land, demands judgment in his complaint for a tract containing twenty-five acres, and the following issue is submitted to the jury: "Is plaintiff the owner of the land described in the complaint?" to which the jury respond, "Yes; one-seventh of the Sandy Bottom tract—160 acres": *Held*, that the verdict is contradictory and a new trial will be ordered.

(CLARK, J., dissenting).

Petition to Rehear by plaintiff. This case was decided at February Term, 1889. (See 103 N. C., 14).

Mr. James E. Moore (by brief), for plaintiff.
Mr. A. O. Gaylord (by brief), for defendant.

AVERY, J.: This is a petition by the plaintiff to rehear and affirm the judgment below in its original form, instead of directing that it be should be so modified as to order a writ commanding the Sheriff to put the plaintiff into possession of one undivided seventh of the land in dispute as a tenant in common. The plaintiff says, in substance, in his petition, that if this Court will not affirm the judgment simply, then he prefers to join the defendant and ask a *venire de novo*, on the ground that the verdict is contradictory.

The first issue with the response to it was as follows: "Is plaintiff the owner of the land described in the complaint? Answer. Yes; one-seventh of the Sandy Bottom tract—160 acres."

The plaintiff claims and demands judgment in his complaint as sole owner of a tract containing twenty-five acres.

In stating the case on appeal, his Honor says: "On the trial, it was agreed that one Ezekiel Leary had originally owned the land. The plaintiff offered evidence tending to show that Emanuel Leary was a son and heir of Ezekiel Leary, and then offered a deed from Emanuel Leary to Bradford Allen (the father of the plaintiff), who had six other children, his heirs." So far, it does not appear what land was covered by the deed to Bradford, the father of the plaintiff, who, with six other children, inherited his land.

The statement of the case then set forth that "there was evidence tending to show the location of the land *described in the deed to Bradford Allen, and tending to show that it was known as the Sandy Bottom tract of 160 acres.*" The second stage of the statement, therefore, brings us one step further, by testimony tending to show not only that the plaintiff was one of seven children, but that the deed to Bradford Allen (we must infer is the one from Emanuel Leary) could be so located as to cover a tract of land containing one hundred and sixty acres, and known as the Sandy Bottom tract, thus tracing, if the evidence is believed, the title to one undivided seventh of said Sandy Bottom tract to the plaintiff, as one of the seven heirs at law of his father, Bradford Allen, from Ezekiel Leary, the admitted common source of title, through Emanuel. "There was no evidence," as the Judge informs us, "that there was any judicial proceeding for partition of the lands of Ezekiel Leary." This does not appear to be material, unless it was intended to give the name of Bradford Allen, instead of that of Ezekiel; but whether that mistake was made, or not, there is nothing in the case to show how the plaintiff ever acquired in severalty any particular part of the 160-acre Sandy Bottom tract that Ezekiel conveyed to his father.

The only other statements of testimony that come up are in the following language (being transposed out of its order without affecting its meaning), viz.: "There was also evidence tending to show possession of Bradford Allen, and those claiming under him, for forty years, of the land in controversy. There were many deeds offered by defendant (none by the plaintiff) from heirs of Ezekiel Leary and others, which defendant insisted covered the land in controversy and offered evidence to show it."

When a plaintiff in an action for possession of land is said to have offered testimony tending to show a possession for forty years, the irresistible inference is that the possession must have been under the deeds he has introduced as evidence of title, and that he intended to use them as color. In this particular case there was no deed located, so far as we know, except the one showing title in Bradford Allen, the plaintiff's father. It was natural, therefore, that the Court should infer, on the former hearing here, that the trespass of the defendant was shown to be on the 160-acre Sandy Bottom tract. That view was strengthened by the instruction given by the Court below upon the law governing adverse possession, and especially in cases where the title deeds of the parties to the controversy lapped each upon the other.

We must remember always that the expression used, "the land in controversy," does not necessarily mean "the land described in the complaint," and if this distinction is well taken, there is not a word in the statement of case on appeal to show that the plaintiff offered any testimony tending to locate twenty-five acres of land described in the complaint. It is not at all unusual for a plaintiff, in actions of this nature, to declare for and describe a boundary containing thousands of acres, when, in fact, the controversy is confined to one or two hundred acres (*vide Dugger* v. *McKesson*, 100 N. C., 1). In such cases the real subject of dispute may be ascertained by a demand for, and the filing of, a bill of particulars, or by directing a verdict that shall specify the limits of the land recovered.

This Court, on the former hearing, did not advert to the fact that the plaintiff had declared for a twenty-five-acre tract, and that its metes and bounds would not, therefore, fit the Sandy Bottom tract of 160 acres; but, acting upon the natural idea that when the statement of the Judge informed us that the plaintiff had offered testimony tending to trace the title of the Sandy Bottom tract to his father, and to show that he was one of seven heirs of Bradford Allen, we inferred that the findings in response to the verdict might be reconciled by treating the "one-seventh of the Sandy Bottom tract" as the one-seventh of the land described in the complaint. The petitioner now admits that there are two responses to the first issue that do not mean the same thing, and upon which a judgment may issue either for a writ of possession for twenty-five acres described in the complaint, or for the one undivided seventh of the Sandy Bottom tract. When the defendant insisted upon a new trial because of that contradiction on the former hearing, that being the only ground of defendant's appeal, the plaintiff resisted. He now insists that when we have two findings—one predicated on the proof offered, and the other in harmony with the pleadings—we shall treat the former as surplusage, and render judgment with a contradictory finding of facts as a basis for it.

According to the statement of case on appeal, the plaintiff made a *prima facie* showing of title only to one undivided seventh of the Sandy Bottom tract, and, if his petition should receive a favorable hearing, it means that a party who brings an action for possession may claim sole seizin and declare for a particular one-hundred-acre tract of land, show in himself title to one undivided tenth of a tract containing one thousand acres, and the Court will make the partition for him after verdict and assume that the specific tract declared for was his share in severalty of the larger body.

Without any information as to how he proposes to point out the location of the twenty-acre tract described in the complaint. and to show that the defendant was a trespasser on it when the action was brought, the plaintiff's attorney now insists in his brief that while the deed to Bradford Allen "*may have been ineffectual to convey* more than the one-seventh that descended to Emanuel Leary from his father Ezekiel (though it does not appear that Ezekiel was one of seven heirs), still it was color of title under which possession would ripen to the twenty-five-acre tract." If that were true, still the difficulty grows out of another fact that Bradford Allen, as well as Ezekiel, had seven children, and the plaintiff offered no evidence to show title except by descent as one of Bradford's seven heirs to one-seventh of the Sandy Bottom tract. The counsel does not insist that the plaintiff has shown the twenty-five acres, by proving the metes and bounds of a deed exhibited in evidence, to be within the limits of the one-hundred-and-sixty-acre tract, but relies upon an alleged admission made in the brief and argument, submitted since the last hearing by defendant's counsel, to show that the tract described in the complaint was really a part of the Sandy Bottom tract, when the original appeal rests solely on the ground that the verdict was contradictory because that very fact did not appear.

The plaintiff does not set forth in his complaint that he is suing for himself and six other heirs at law of Bradford Allen, but claims sole seizin, as he does not sue for his co-tenants; and the law, as expounded by this Court, limits his recovery to the undivided interest in the land for which he shows title and demands judgment. If he offers only evidence to establish title to such interest in one tract, and declares in his complaint for a different tract, there is fatal variance between the allegation and proof.

The learned Judge who tried the cause below very properly did not treat "the land in controversy" and "the land described in the complaint," as convertible terms. He understood, evidently, that the land really in dispute was some border land where the title deeds of the parties located, according to the contention of the parties respectively, would lap upon each other.

We append so much of the charge as is sent up, together with the exception to the judgment, as every other material portion of the case on appeal has already been set forth.

The instructions given presented every aspect of the case arising on the volume of evidence, oral and documentary. The only error alleged was that the Court had instructed the jury that if the plaintiff, and those under whom he claimed, held possession of part of the land embraced in his deed for more than seven years, openly, continuously and adversely, it would ripen his title to all the land embraced in his deed, which was not occupied by anyone else, unless there was a lapse; if there was a lapse, and neither party was in possession of the lappage, as to that part embraced in both deeds, the latter title would prevail. The motion for new trial was overruled. Then the defendant objected that the answer of the jury was not responsive to the issues, and was vague and indefinite. The Court, being of opinion that the answer of the jury was sufficient, gave judgment for the plaintiff, and the defendant appealed.

So that we would naturally infer, from the facts before us, that the real controversy was narrowed down to a very small corner of the one-hundred-and-sixty-acre tract, where the defendant trespassed and tried to show title derived from Ezekiel Leary. It is possible that the plaintiff did offer evidence tending to trace the title to the specific twenty-five acres to himself, but it does not appear, except from his petition, and we cannot assume it to be true. It followed, therefore, that the plaintiff is not entitled to judgment for a writ of possession for the (one-hundred-and-sixty-acre) Sandy Bottom tract, because he did not allege that he had title to it, while he cannot recover the twenty-five-acre tract, because he failed to prove title to it. We cannot, therefore, say that the contention of the defendant on the former hearing was unreasonable, when he insisted that, according to the statement, one of the verdicts of the jury was based upon allegation without proof, and was irreconcilably in conflict with the other.

In the case of *Mitchell* v. *Brown*, 88 N. C., 156, the jury found, in response to a firrst issue, "Yes," which meant that the plaintiff was the owner of the land described in the complaint, but the response to a subsequent issue being contradictory, a new trial was granted. Where the findings of a jury are apparently repugnant in any material respect, so that the Court cannot safely proceed to judgment and see it is unmistakably that to which the verdict establishes a right, a new trial must be granted. *Porter* v. *Railroad*, 97 N. C., 66; *Smith* v *Fite*, 98 N. C., 517; *Morrison* v. *Watson*, 95 N. C., 479; *Turrentine* v. *Railroad*, 92 N. C., 638. The rule generally laid down is, that an inconsistent verdict, or one that, in connection with the pleadings, requires explanation to make it harmonize completely with the pleadings and evidence and support a judgment, will be set aside, if it is too late to have it reformed by the jury. *Clough* v. *Clough*, 6 Foster (N. H.), 24; Hilliard on Mistrial, § 29;

2 Waterman & G. on New Trial, p 37; *Walpon* v. *Eyster*, 7 Watts (Penn.), 38; *Hyatt* v. *Railroad*, 6 Hun. (N. Y.), 306.

The plaintiff should have asked the Judge below to have the verdict reformed by the jury, so as to elicit an unqualified answer to the question involved in the first issue. In failing to do so, he has placed himself in such a position that he must accept the alternative prayer of his petition and join the defendant in asking a *venire de novo.* We accordingly grant the prayer of the petitioner in that respect, by ordering a *venire de novo.*

Venire de novo.

CLARK, J.—dissenting: This action is for the recovery of twenty-five acres of land, specifically described in the complaint by metes and bounds. The complaint avers that the plaintiff is the owner and entitled to possession thereof, and that defendant is wrongfully in possession. The answer denies these averments, and further denies that there is any such land in the county as that described in the complaint.

The following issue was submitted to the jury: "Is the plaintiff the owner of the land described in the complaint and entitled to possession thereof?" To which the jury responded, "Yes; one-seventh of the Sandy Bottom tract, 160 acres." And the Court below gave the plaintiff judgment for the twenty-five acres described in the complaint.

When this case was here before (103 N. C., 14), the Court construed that the plaintiff was entitled to an undivided one-seventh of the 25 acres. This is now conceded to have been an inadvertence, as the effect was to give the defendant six-sevenths of 25 acres described in the complaint, when the jury found that the plaintiff was the owner of the whole, and to give plaintiff one-seventh of 25 acres, when the verdict gave him land which it described as one-seventh of 160 acres, thus giving plaintiff one-forty-ninth instead of one-seventh of 160 acres. This inadvertence resulted from treating the verdict as necessarily for an *undivided* one-seventh, and as if plaintiff were suing as a tenant in common to be let into possession with his co-tenants.

The verdict was evidently for "the land described in the complaint" It says so, and the superadded description of it as one-seventh of the Sandy Bottom tract is doubtless caused by the denial in the answer that there was any such land in the county. There seems no confusion in the verdict in this view, and the learned Judge who tried the cause, and who comprehended all the points in controversy, must have understood there was none, or he would not have received the verdict in that shape. A consideration of the evidence will sustain this view, which is so entirely in accordance with the pleadings, the issue, and the judgment The case on appeal states: "On the trial it was agreed that one Ezekiel Leary had originally owned the land. The plaintiff offered evidence tending to show that Emanuel Leary was son and heir of Ezekiel Leary, and then offered a deed from Emanuel Leary to Bradford Allen, dated in 1842 The plaintiff then offered evidence that he was son and heir of Bradford Allen, who had six other children, his heirs. There was evidence tending to show the location of the land described in the deed to Bradford Allen, and tending to show that it was known as the "Sandy Bottom tract of 160 acres." There was also evidence tending to show possession by Bradford Allen, and those claiming under him, for forty years, of *the land in controversy.* There were many deeds offered by defendant from heirs of Ezekiel Leary and others, which defendant insisted covered the land in controversy, and offered evidence tending to show it. There was no evidence that any judicial proceeding had ever been had for partition of the lands of Ezekiel Leary. The defendants claimed under deed from the heirs of Ezekiel Leary, which they contended covered the land in controversy. Take it that Emanuel Leary was tenant in common with the other heirs of Ezekiel Leary, still Emanuel Leary's deed to Bradford Allen in 1842 for the Sandy Bottom 160 acres was color of title; and the forty years open adverse and continuous possession under it, of the specific twenty-five acres in controversy, by Bradford Allen and his son, the plaintiff, gives them the title against the co-tenants, heirs of Ezekiel Leary, and the defendants who claim under them. Indeed, twenty years would have been sufficient, even if co-tenancy had been admitted. *Gaylord* v. *Respass*, 92 N. C., 553. The plaintiff's title *in toto* being denied, is an admission of actual ouster, and seven years was sufficient. *Withrow* v. *Biggerstaff*, 82 N. C., 82, and *Page* v. *Branch*, 97 N. C., 97. It is true that plaintiff is only one of the heirs of Bradford Allen, but one tenant in common can maintain an action for recovery of the common property. *Thames* v. *Jones*, 97 N. C., 121; *Brittain* v. *Daniels*, 94 N. C., 781; *Yancey* v. *Greenlee*, 90 N. C., 319, and cases there cited. This view of the case is clear from the only exception taken on the trial, which was that the Judge charged, "If the plaintiff, and those under whom he claims, held possession of a part of the land embraced in his deed for more than seven years openly, continuously and adversely, it would ripen his title to all the land embraced in his deed, which was not occupied by some one else." That is, as the plaintiff, according to the above evidence, had a deed for 160 acres, if he had shown himself in continuous adverse possession of the twenty-five acres described in the complaint, or any part thereof, for seven years (actual ouster being admitted by defendants' denial of plaintiff's title), it would ripen his title to the part so held in adverse possession. The Court could not be understood to charge thus as to the open adverse possession of an *undivided* one-seventh.

It is true that a plaintiff may claim title to one thousand acres, and on proof of title, or possession ripening a color of title to 100 acres, he will recover the 100 acres. But here he alleges title to twenty-five acres; he shows color of title to 160 acres, and adverse possession ripening that title to the twenty-five acres claimed, and the jury following, it is to be presumed, the instructions of the Court, answer as to the query, "Is the plaintiff the owner of the twenty-five acres described in the complaint?" "Yes; he is." This is clear and unmistakable from the evidence, the charge and the pleadings. That the jury should have added the identifying description of it, that it was one-seventh of the Sandy Bottom tract, is not strange, considering the denial of the location of the land contained in the answer, and, at the most, it was mere surplusage. There is nothing either in the pleadings, in the evidence, or in the charge, to suggest that the jury could have meant an *undivided* one-seventh, or anything except a mere identification of the twenty-five acres described in the complaint as being a part of a better known tract called "Sandy Bottom." It would be a hardship to put the parties to the expense of another trial, in which the Court below says there "was a volume of evidence," on account of the well intended identification of the land sued for, which the jury unnecessarily, and by way of surplusage, added to their unequivocal finding that the plaintiff was "the owner and entitled to possession of the land *described in the complaint.*"

The defendant, indeed, in his printed brief, admits that the deed of 1842 to the plaintiff, in fact, conveyed only the twenty-five acres specifically described in the complaint, but it is immaterial whether the color of title was for 160 acres or twenty-five acres; besides, we must follow the case as stated by the Judge. The Judge told the jury the plaintiff could recover the twenty-five acres, or a part thereof, if embraced within the color of title, and of which he had shown seven years' continuous adverse possession. Had the plaintiff shown possession, as well as color of title, beyond the twenty-five acres he could not recover it without an amendment to his complaint. This he did not ask He is content with the response of the jury that he is the owner of the land described in the complaint and entitled to its possession. What the jury have given him, he should have judgment for without modification or further litigation.

JAMES A. TAYLOR v. B. W. HODGES.

Construction of Mortgage—Crop Lien—Evidence—Demand by Creditors before Action—Unnecessary when Debtor refuses to Pay—Form of Judgment in Action of Claim and Delivery.

1. Where a contemporaneous mortgage is given to secure a note for 595 pounds of cotton, dated April 30, 1887, and payable October 1, 1887, conveying "all of my entire crop to be made on my lands in Averasboro Township, Harnett County," it is unmistakable that the mortgage referred to and conveyed the crop of 1887.
2. In such case the defendant was not injured, and cannot complain that on the trial incompetent testimony was allowed to go to the jury to show "that crop" was intended to be conveyed.
3. Where a debtor notifies a creditor that he will not pay a debt due him, the law does not require the latter to make demand before bringing suit.
4. Where, in an action of claim and delivery, the plaintiff, claiming a mortgage lien, seized, and the defendant replevied, $223.50 worth of property, and, on the trial the plaintiff recovered judgment for $50.37, the proper judgment to be entered is "that plaintiff recover the specific property, and if possession cannot be had, then the penal sum named in the bond of the defendant and his sureties, with a proviso that the specific property shall be relieved of the lien and liability to seizure and sale, and the defendant and the sureties on his bond discharged by the payment of $50.37, with interest from the beginning of the term and costs."

This was an Action of Claim and Delivery, tried before *Armfield, J.*, at the November Term, 1889, of HARNETT Superior Court.

The plaintiff claimed the property mentioned in his complaint by virtue of a note and chattel mortgage bearing date April 30, 1887. The note was given for "595 pounds of good white cotton, payable on the first day of October" of the same year, and the mortgage was of the same date, payable at the same time, and the description of the property as contained in the mortgage is as follows:

"I, Burrell Hodges, of the county of Harnett and State of North Carolina, am indebted to James A. Taylor, of said county and State, in the sum of five hundred and ninety-five pounds good white cotton, for which he holds my note, due the first day of October, 1887, and, to secure the payment of the same, I do hereby convey to him these articles of personal property, to-wit: All of my entire crop to be made on my lands in Averasboro township, Harnett County, N. C., one black ox, six head of cows and twenty head of cows, all the above property being entirely free from any incumbrance whatever," &c.

The defendant objected to the introduction of the note and mortgage—first, that there was a material variance between the allegations of the complaint and the evidence offered; and second, that the description of the property attempted to be conveyed by the mortgage was so indefinite, vague and uncertain that no title to the property sought to be recovered passed to the plaintiff by virtue of the mortgage; and third, that the mortgage attempted to convey an unplanted crop. The objections were overruled and the evidence admitted by the Court, and the defendant excepted

On examination, the plaintiff was asked to state what sort of cotton, whether lint or seed-cotton, was intended by the note; and further, the crop of what year was intended to be conveyed by the mortgage, to which the defendant excepted upon the ground that the written instrument could not be varied or explained by parol testimony in that way, but the Court overruled the objection and allowed the plaintiff to give the explanations asked for, to which the defendant excepted.

The defendant was introduced as a witness in his own behalf, and, upon cross-examination, was asked by the plaintiff the crop of what year was intended to be conveyed by the mortgage, to which the defendant objected, but the Court overruled the objection and required the defendant to answer the question.

There was no evidence that the plaintiff ever demanded the possession of the property sought to be recovered in this action, but the plaintiff testified that the defendant said that he never intended to pay the note in question, but that he (plaintiff) must get it according to law; and the defendant set up a counter claim in the action against the plaintiff for $3,000, alleging that the plaintiff promised that, if defendant would sign the note and mortgage upon which this action was based, that plaintiff would furnish the defendant, during that year, with all the farm supplies that defendant should need, and this was denied by the plaintiff.

The defendant asked the Judge to charge the jury as follows:

1. That, as there was no evidence that the plaintiff ever demanded the possession of the property of the defendant sought to be recovered in this action before bringing this action against the defendant, that the plaintiff was not entitled to recover; and

2. That the description of the property as contained in the mortgage was so uncertain, indefinite and vague that no title to the property passed to the plaintiff by virtue of said mortgage.

All this was declined by the Judge, but he charged the jury that, as the plaintiff had testified that the defendant had said that he would not pay the debt, that, therefore, a demand for the possession of the property was not necessary before bringing the suit, and that the description of the property as contained in the mortgage was sufficient to pass the title of the property to the plaintiff.

The following are the only issues that were submitted to the jury by his Honor:

1. What is defendant indebted to plaintiff on the note and mortgage mentioned in the complaint?

Answer: $50.57½, and interest at six per cent.

2. What is plaintiff indebted to defendant on the counter-claim?

Answer: Nothing.

3. What is the value of the property mentioned in the claim and delivery?

Answer: $223.50.

Upon the verdict, judgment was entered that the plaintiff is the owner and entitled to the possession of the property described in the pleadings, and that the plaintiff recover possession of said property from the defendant, or, if possession cannot be had, then he recover of the defendant and G. R. Hodges, surety on his replevin bond, the value of said property, to-wit, $223.50.

The defendant appealed.

Mr. E. C. Smith, for plaintiff.

Messrs. F. P. Jones and *W. E. Murchison*, for defendant.

AVERY, J.—after stating the facts: There was no question raised as the identification of the land to which description in the mortgage pointed, and we assume that the description was made certain by showing where all the lands owned and cultivated by the defendant in Averasboro Township, Harnett County, North Carolina, were located. *Blow* v.

Vaughan, decided at this term. On the 30th of April, 1887, the mortgage was executed to secure a note due October 1st, 1887, and for that purpose the defendant conveyed "all of my entire crop to be made on my lands in Averasboro township," &c. The mortgagor had no power to create a lien on any except the "crop planted, or about to be planted, in the year next following the execution of the conveyance." *Smith* v. *Coor*, 104 N. C., 139; *Wooten* v. *Hill*, 98 N. C., 49; *State* v. *Garris*, *ibid*, 733. The inference is, therefore, unmistakable that the crop of the year 1887 was that referred to and conveyed by the deed, and that construction is supported by the fact that the note secured was payable on the 1st day of October of that year, when the crop was maturing daily. *Woodlief* v. *Harris*, 95 N. C., 211; *Rountree* v. *Britt*, 94 N. C., 104. If the description contained in the deed was fairly susceptible of the interpretation we have given it, the defendant was not injured, and could not justly complain, even if the Judge allowed other incompetent testimony to go to the jury to show what crop was intended by the parties to pass by the mortgage, when he might have instructed them that the deed would create a lien on all the crops planted by the defendant on his land in said township during the year 1887, and no others. *Comron* v. *Standland*, 103 N. C., 207. He might, perhaps ought to, have told the jury that the defendant admitted in his answer that he conveyed the crop of 1887, and was bound by that admission.

Where the debtor notifies the creditor that he will not pay a debt due him, the law does not require the latter to go through the vain form of demanding the debt before bringing an action to recover it, and his Honor did not err in presenting that view of the law to the jury.

The jury find that the sum actually due from defendant to plaintiff was \$50.37½, while the value of the property conveyed and seized was \$223.50. The plaintiff was entitled to the possession of the property for the purpose of selling to satisfy the debt, if it was not paid, but he had no right to recover the full value of the property from the defendant and the sureties on his bond without qualification or condition, when the jury had ascertained that a smaller sum was due. Justice READE, in *Bitting* v. *Thaxton*, 72 N. C., 541, said: "If there is anything settled in our new system, it is that there is but one form of action. There are torts and contracts just as there used to be, but there are not several forms of action. * * * It is the transaction that is to be investigated without regard to its form or name." *Walsh* v. *Hall*, 66 N. C., 233; *Wilson* v. *Hughes*, 94 N. C., 182. The fact is found that only a certain sum remains due and constitutes a lien upon the mortgaged property, and the law cannot be so construed as to permit the recovery of a much larger sum than the debt ascertained to be due. Section 324 of *The Code*, as amended by ch. 50, Laws of 1885, prescribes a form of replevin bond peculiarly adapted to those cases where the title to specific personal property (such as horses) is the only question at issue, and the full value of the property is the just alternative allowance as damages, when the property is not delivered But where the action is brought by a mortgagee, who seizes to sell and satisfy the debt, or a counterclaim is set up, the Court has the power to so frame its judgment as to do justice and prevent oppression. *Wilson* v. *Hughes*, *supra*.

The Court should have adjudged that the plaintiff recover the specific property, and, if possession could not be had, then the penal sum named in the bond of the defendant and his sureties, with a proviso that the specific property should be relieved of the lien and liability to seizure and sale, and the defendant and the sureties on his bond discharged from their obligation growing out of its execution, by the payment of $50.57½, the sum actually due, with interest from the beginning of the term at which the verdict was rendered, and costs of the action. The judgment must be modified accordingly.

Modified and affirmed.

W. D. ROUNTREE et al. v. SALLIE R. DIXON et al.

Will—Construction of—Power to Charge Estate.

A testator devised as follows: "*Item.* It is my will and desire that my beloved wife, Sallie R. Dixon, shall hold, use, occupy and enjoy my entire estate, both real and personal, as I have done heretofore, to care for my children in the same way, during her natural life, with power to dispose of any surplus stock of farming implements she may find as unnecessary in carrying on the farm, and apply the proceeds of such sale to the support of herself or family; to have no public sale of my property; to act as her better judgment may dictate to her in the management of my estate and children, with authority, at her death, if any of our children should be minors, to choose for them a guardian to take charge of their portion of my estate. *Item.* I leave it at the discretion of my beloved wife, Sallie R. Dixon, as my children shall arrive at the age of twenty-one years, to allot to them at her pleasure, such portion or part as she may choose to do, not to exceed their *pro rata* of my estate: *Held*, that the wife had no authority to create debts chargeable against the testator's property, not even for the support of herself and children, or the cultivation of the land.

(DAVIS, J. and CLARK, J., dissenting).

This was a CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1889, of the Superior Court of GREENE County.

It appears that some time after the month of January, 1882, F. W. Dixon, of the county of Greene, died, leaving a last will and testament, which was duly proven, and the following is a copy of such parts thereof as it is necessary to interpret in this action:

"*Item.*—It is my will and desire that my beloved wife, Sallie R. Dixon, shall hold, use, occupy and enjoy my entire estate, both real and personal, as I have done heretofore, to care for my children in the same way, during her natural life, with power to dispose of any surplus stock or farming implements she may find as unnecessary in carrying on the farm, and apply the proceeds of such sale to the support of herself or family; to have no public sale of my property; to act as her better judgment may dictate to her in the management of my estate and children, with authority, at her death, if any of our children should be minors, to choose for them a guardian, to take charge of their portion of my estate.

"*Item.*—I leave it at the discretion of my beloved wife, Sallie R. Dixon, as my children shall arrive at the age of twenty-one years, to allot to them, at her pleasure, such portion or part as she may choose to do, not to exceed their *pro rata* of my estate.

"*Item.*—And lastly, I do constitute and appoint my beloved wife, Sallie R. Dixon, my lawful executrix, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made."

The following is a copy of the findings of facts and judgment thereupon of the Court:

"This cause coming on to be heard upon the pleadings and admissions, and being submitted to the presiding Judge (a jury trial being waived), the following facts are found, the heirs at law adopting the answer of the defendant S. R. Dixon:

"1. That the defendant S. R. Dixon is the widow of F. W. Dixon, deceased, and the other defendants are his children and heirs at law, and the said defendant is the executrix of the last will and testament of F. W. Dixon, deceased, which has been duly admitted to probate and letters testamentary have been granted to her.

"2. That the defendant S. R. Dixon executed the note set out in the complaint to W. H. Dail & Bro., in settlement of a debt incurred by her, under the provisions of said will, for the support of herself and children and in the management and cultivation of the estate of her testator.

"3. That said note was assigned to plaintiffs by the payees, with notice as aforesaid, and no part thereof has been paid.

"It appearing to the Court that, under the provisions of said will, the defendant S. R. Dixon had a life estate in the said estate for the use of herself and children, with power to dispose of certain surplus personal property for their said use and support, and with full power to hold, use, occupy and enjoy the entire estate of the testator as he had done, and to care for the children and to act according to her own judgment in the management of said estate, the presiding Judge is of the opinion that the said S. R. Dixon, executrix and trustee for the purposes named in said will, had power to contract debts for necessary expenses in the management and cultivation of the estate of her testator and for the support of herself and children, and that said debt, when contracted, became a charge upon the said estate, real and personal, subject to all rights of homestead and personal property exemptions.

"It is, therefore, considered and adjudged that the plaintiffs recover of the defendant S R. Dixon the sum of four hundred and forty-one dollars and twenty-two cents, with interest thereon at eight per cent. from March 12, 1887, until paid; and the same is declared to be a charge upon the estate of her testator, both real and personal.

'It is further adjudged that, if the judgment here rendered be not paid on or before January 1, 1890, that D. W.

Patrick be appointed commissioner to sell the real and personal estate, or so much thereof as may be necessary to discharge said judgment; and one for the same amount, rendered at this term, in favor of Elliott Brothers, plaintiffs, against the defendants in this action, after having the homestead and personal property exemptions allotted to said S. R. Dixon and infants, according to law, and report said sale to the next term of the Superior Court of Greene County for confirmation."

The defendants having excepted, appealed to this Court.

Messrs. G. M. Lindsay and *Geo. Rountree,* for plaintiffs
Messrs. W. R. Allen and *Geo. V. Strong,* for defendants.

MERRIMON, C. J.—after stating the facts: We are of opinion that the Court below misinterpreted the material clause of the will of F. W. Dixon, the deceased testator, and erroneously gave judgment charging the estate, personal and real, with the debt of the plaintiffs. The testator does not, by the clause of his will in question, devise to his wife an estate for her life, or any estate in his real property, or give to her absolutely his personal property. The language employed is not appropriate to create such estate, nor does a purpose to do so appear from the terms or obvious purpose of the will

The testator directs that his wife "shall hold, use, occupy and enjoy" all his property, as he did in his life-time, for a specified purpose—that of caring for his children in the same way that he had done while she should live. It is not said that she shall have or own the land, may sell it or any part of it, or dispose of it at all for any purpose, except that she may, in her discretion, "allot" to each of his children, as he or she shall come of age, his or her *pro rata* share. She is to "hold" the property—that is, have exclusive control, direction and superintendence of it; she is to "use" it—that is, cultivate and apply it for the purpose specified; she is to "occupy" it—that is, live on it with her children, servants and employees; she is to "enjoy" it—that is, have benefit of and devote it as her husband had done in his life-time, in caring for herself and his children. He made and used and sold his crops—he did not sell the land—and devoted them to their support. The wife is expressly invested with power to "dispose of any surplus stock or farming implements she may find as unnecessary in carrying on the farm and applying the proceeds of such sale to the support of herself and family. The power to sell the surplus crops is implied by the right to "use" and "enjoy" the property.

There is nothing going to show that the testator intended that his wife should sell the property, real or personal, that he left, except the "surplus stock or farming implements"; and it is singular that he did not invest her with general power to sell any part, or all, of the property, if he intended she should do so. He thought of, and had in his mind, the subject of power of sale, because he gave it to a limited extent and created a general power to "allot" the land to his children in the case specified. He knew what the power to sell meant.

The clause of the will under consideration strongly suggests that the testator believed he left property abundantly sufficient, under the superintending care and control of his wife, in whose judgment and business capacity it is clear he had great confidence, to support and rear his family, and that he did not think of, or intend, a sale of any part of it. He intended, for the purpose of keeping his family together, that his property should remain under the control of his wife. A power to sell it would be inconsistent with and subversive of his general chief purpose in making a will, and cannot be allowed by mere implication. If the wife may sell a part of it, in her discretion, she might sell the whole of it and the family might, in a brief while, be homeless, the very thing the testator intended to provide against and prevent. And, for the like reason, the testator did not intend that his wife should create debts chargeable against the property; he expected that, by good husbandry and management, the land would support his family as it had done in his life-time.

It is asked, how are repairs on the farm and crops to be made, and possible pressing wants of the family to be supplied, if debts cannot be created chargeable on the property? The obvious answer is, the testator did not so intend and provide, and it is not the province of the Court to make the testator's will, to supply a provision in it, or provide for a possible case he did not think of or contemplate. It can only decide what the will is—what is expressed therein.

For the reasons stated, the wife and executrix in this case had no authority to create debts chargeable against the property of the testator. If merchants and others allow her to create debts, they have their remedy against her and her own property—not against that of the testator; he devoted it to his family in the way already indicated. The will contemplates that the crops produced on the land from year to year shall supply means to purchase such necessary things for the family and the farm as cannot be produced on the land. Beyond such crops, and the proceeds of sales "of any surplus stock or farming implements," the wife, as such, or as executrix, has no power to charge the property of her testator, nor has the Court, for the like reason.

The appellees relied, in part, on *Cannon* v. *Robinson*, 67 N. C., 53. That case is badly reported, and it does not appear from it what the clause of the will interpreted provided. On looking to the will in the papers on file, we find that the testator expressly devised to his executors certain lands in trust for the use and benefit of his wife and others named, and directed that the executors have them cultivated "by employing free labor," &c. The wife and others did not live on the land, nor was any fund provided for employing laborers, nor was any personal property given the executors, such as horses, mules and other things necessary to the cultivation of the lands. It was manifest that the testator intended that his executors should make debts for the purposes specified. That case is essentially different from this, and so are all the cases cited by the appellees' counsel.

There is error. So much of the judgment appealed from as directs a sale of the personal and real property of the testator must be reversed, and in other respects it will remain undisturbed

Error.

ELLISON & HARVEY v. A. N. SEXTON and J. A. SEXTON, partners trading as A. N. SEXTON & CO.

Partnership—Notice of Dissolution.

1. A partner retiring from the partnership, in order to relieve himself from further liabilities must bring actual notice of such retirement and of such dissolution of the partnership home to such persons as have been accustomed to deal with it.
2. As to persons having knowledge of the firm before its dissolution, but not having dealt with it, general public notice of the dissolution, given in any reasonable way, will be sufficient.
3. A single publication of a notice of dissolution, in a paper published in the place where the firm did business, and having a large local circulation, is not sufficient.

CIVIL ACTION, tried before *Graves, J.*, at February Term, 1890, of the Superior Court of WAKE County.

On the trial, it was "admitted that the defendants A. N. Sexton and J. A Sexton were partners, doing a general grocery business in Raleigh," under the name and style of A. N. Sexton & Co.; that they did business during the year 1883 and part of the year 1884; the partnership was dissolved about May of the latter year. The business was continued by the defendant A. N. Sexton under the firm name, until his failure, a year or two afterwards. The evidence tended to prove that the firm was well known in the city of Raleigh, and elsewhere; that it had been reported through "Bradstreets' Mercantile Agency"; that business people, many of them, saw such report and consulted such Agency; that it reported J. A. Sexton as the solvent member of the firm, &c. The evidence further went to show that the firm gave notice to persons and firms with whom it had dealt of its dissolution. The plaintiffs had not dealt with it before that time. Afterward, in the months of August, October and December, of the year 1884, the plaintiffs, merchants of Richmond, Va., sold to "A. N. Sexton & Co.", whiskey of the value of $489.31, and this action is brought to recover the sum due for the same, and particularly to charge the defendant J. A. Sexton therewith, as a member of the firm named, upon the ground that he allowed his co-defendant to use the firm name after the formal dissolution of the partnership, and that no notice of such dissolution was given to the business public. There was evidence on the trial tending to prove that the plaintiffs, through their business agent, had express notice of such dissolution of the partnership, and that the defendant J. A. Sexton had gone out of the business, and was not of the firm, or in any way connected with the business as continued. There was also evidence to the contrary. There was no evidence on the trial of general notice of the dissolution of the partnership, except the following:

"I am proprietor of the *Evening Visitor;* it has a large local circulation; not large out of the State; I published the notice of dissolution at the request of one of the Sextons; I think it was the Doctor; he told me to publish one time; I told him it should be published thirty days; there was only one insertion of the notice; he did not direct publication any more than one time."

On the subject of notice, the Court instructed the jury as follows:

"If one party sells out his interest in the co-partnership, and withdraws therefrom, this is a dissolution, and the actual co-partnership is at an end.

"But as to all other persons, a constructive partnership continues until proper notice of such dissolution is given.

"General notice is sufficient as to the public in general, but as to such as have had dealings actual notice must be given.

"The plaintiffs never had any dealings with the defendants prior to the alleged dissolution.

"And so the law did not require any of the defendants to give to the plaintiffs any actual notice.

"Notice of dissolution may be made, so far as the general public is concerned, by publication in a newspaper published in the town where the firm does business for a sufficient time to give notice to those with whom the partners dealt.

"Of course such notice must be given in a public manner, in a newspaper of general circulation.

"The law would not allow a mere pretence to the mode of publication.

"It must be a fair, open notice, so that it may be read of all concerned.

"The law requires good faith in all dealings, and will not allow any person, by any false light, to mislead another in matters of contract, and escape responsibility.

"If a man knows that he is held out as a partner, and if he allows his name to be used on a public sign over a place of business, and persons induced by such appearance extend credit, he who allows himself to be thus held out to the public would be estopped to deny that he was a partner, and would be held to be a partner by construction of law."

The plaintiffs requested the Court to instruct the jury that the notice given in the newspaper mentioned was not notice; certainly, not sufficient notice. The Court did not do so, otherwise than as above stated. The plaintiffs excepted, and appealed.

Mr. W. J. Peele, for the plaintiffs.
Mr. E. R. Stamps, for the defendants.

MERRIMON, C. J.—after stating the facts: Evidence was produced on the trial to prove that the plaintiffs had knowledge of the business partnership of A. N. Sexton & Co., and that the defendant J. A. Sexton was the solvent member thereof before its dissolution in May, 1884. In the absence of knowledge or notice of such dissolution and the retirement of J. A. Sexton from the firm and its business, and as the other partner continued the business under the firm name, the plaintiffs might reasonably, and they had the right to, infer that the firm continued to exist, and that the retiring member of it was still a member thereof, and responsible for such debts and liabilities as the member continuing the business might contract or incur in the course of the business in the name of the firm, and they might safely act upon such inference. Such continued responsibility of the firm, including that of the retiring partner, rests upon the ground of the negligence of the partners, in that they left the business community in ignorance of the dissolution of the partnership, and thus left strangers to conclude that it continued, and to have faith and confidence in the partnership named. It rests upon the just principle that, if one of two persons must suffer by reason of a credit given, he whose act or negligence misled the confidence of the other, and who has been the cause of such credit by his misrepresentation, his negligence or fraud, ought to suffer, and not the other. It contravenes reason and common justice that a person in no default shall suffer loss by reason of the *laches* and misconduct of another, when one or the other must suffer loss. Gould on Partnership, 248; Collyer on Part., § 530; Story on Part., § 160.

A partner retiring from the partnership, in order to relieve himself from further liabilities incurred of the firm, must bring actual notice of such retirement, and of the dissolution of the partnership, home to such persons as have been accustomed to deal with it. It is not essential that such notice shall be given in any particular form—it may be express or it may be implied from circumstances. It must appear, however, with reasonable certainty, that such persons in some way received actual notice. This is so, because established business relations might lead such parties more readily to give the firm credit. Moreover, they are known to the firm, and may be readily, in some proper way, notified. *Scheiffelin* v. *Stevens*, 1 Winst. (N. C.), 106.

As to persons who had knowledge of the firm before its dissolution, but had not had dealings with it, general public notice, given in any reasonable way, will be sufficient. Evidence of facts and circumstances that, in their nature, connection and bearings, put the public or particular parties claiming or complaining, on notice, may be submitted to the jury, with proper instructions from the Court, to prove the required notice.

Such notice given in a regular newspaper, of general circulation, published in the city, town or county where the partnership business is carried on, is the usual method of giving information, and may, in ordinary cases, be sufficient, when continued for a reasonable length of time—this depending somewhat upon the nature, extent and place of the business. It is said that the sufficiency of notice thus given might be questioned, in many cases, unless it shall be shown that the person entitled to notice was in the habit of reading the paper. General public notice thus given would not be actual and express notice, but it would be presumptive in its nature, and from it the jury might, under proper instructions from the Court, conclude such persons as had not had previous dealings with the firm. Collyer on Part., §532; Story on Part., §161; *Tirjoy* v. *Spofford*, 93 U S. R., 430.

It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner, but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice—that the party to be charged with it actually had it, or might, by reasonable diligence, have learned of the dissolution of partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally, the reasonableness of the notice will be a mixed question of law and fact, to be submitted to the jury, under proper instructions of the Court as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution. As said above, ordinarily, notice fairly given in a newspaper, generally circulated abroad, and particularly among the business people of the town or city where the partnership carried on its business, would be sufficient as to all persons who had not had previous dealings with the partnership. It is better and safer to give notice in that way, although it might be given in other ways. This would afford business men reasonable opportunity to learn of the dissolution, and, in the course of business, the matter would be generally known and more or less spoken of to business men from every direction. But such publication must be fair and reasonable as to its terms and the number of times it shall be made.

If the facts are found or ascertained, the reasonableness and sufficiency of the notice may be a question of law for the Court. The Court must determine that there is, or is not, evidence sufficient to go to the jury to prove notice.

In the present case there was evidence of actual notice to plaintiffs of the retirement of the defendant J. A. Sexton from the partnership in question, but there was evidence to the contrary. Whether there was reasonable and sufficient general public notice of it becomes a material question. We cannot hesitate to decide that there was not sufficient evidence of it to go to the jury. Such notice was published in a daily paper one time, the circulation of which was confined mainly to the city of Raleigh. It does not appear that any one actually saw or read it, whether it appeared in an obscure place in the paper, or what space it occupied. Nothing appeared going to show that the plaintiffs saw the paper, or that they ever heard of the notice in any way. It was shadowy, entirely too slender of itself, to serve any practical or just purpose, especially as the business was continued in the firm name. The Court should, in the proper connection, have told the jury that there was no evidence before them of general notice, and, as he failed to do so, there is error. The plaintiffs are entitled to a new trial, and we so adjudge.

Error.

DONALD W. BAIN, State Treasurer, v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Taxation—Inter-State Commerce.

The rolling stock of a non-resident railroad corporation passing through the State for purposes of inter-State commerce is not liable to taxation in this State.

This was a CIVIL ACTION, tried before *Armfield, J.*, at October Term, 1889, of the Superior Court of WAKE County.

The plaintiff is the Treasurer of North Carolina. The defendant is a corporation of the State of Virginia and has a lease of the railroad of The North Carolina Railroad Company, a corporation of this State, and it does the business of transporation in, through and across this State, from the State of Virginia and other States, to the State of South Carolina and other States.

The purpose of this action is to recover the sum of $350 as taxes alleged to be due this State from the defendant and for costs.

The following are the facts found by the Court below, and its judgment thereupon:

"1. The Richmond & Danville Railroad Company was, on June 1, 1888, the owner of $17,500 worth of rolling stock, to-wit, four "switching engines" and "one coach," which were, on June 1, 1888, used exclusively in North Carolina, but owned in Virginia, and which the company may at any time recall.

"2. Upon all the rolling-stock of the Richmond & Danville Railroad Company, the company is assessed for taxation, and does pay taxes, in Virginia.

"3 The rolling stock of the North Carolina Railroad Company is used exclusively in North Carolina, and upon all this rolling stock, of the assessed value of $125,000, taxes are assessed and paid in North Carolina by the Richmond and Danville Railroad Company, the lessee.

"4. The board of appraisers and assessors of the North Carolina Railroad made the assessment, as set out as an exhibit to complaint, of $175,000 upon the rolling stock of the Richmond and Danville Railroad Company in use in North Carolina, on June 1st, 1888.

"5. On June 1st, 1888, there was in use on the North Carolina Railroad, leased by the Richmond and Danville Railroad, in North Carolina, rolling stock passing through the State to the value of $175,000. Such rolling stock was owned by the Richmond and Danville Railroad Company, and the trains in which said rolling stock was used were made up outside of North Carolina and went on through to the State of South Carolina.

"Upon this state of facts, his Honor ruled that the defendant company was liable to pay taxes to the State upon $17,500 (on the engines and coaches used exclusively in North Carolina), and was not liable to pay upon $157,500, the remainder, used in inter-State commerce.

"Therefore, it is adjudged that the plaintiff recover of the defendant the sum of $350 and interest from July 1st, 1888, and costs."

The Attorney General and *Mr. R. H. Battle*, for the plaintiff.
Mr. C. M. Busbee, for the defendant.

MERRIMON, C. J.—after stating the facts: The power and right of the State to tax property of non-residents, whether these be natural or artificial persons, having its *situs* within the State for the purposes of business, convenience or pleasure of the owners thereof, or others, is too well settled to admit of serious question. This important right of the State is surely founded upon the just ground that such property has the protection, advantage and benefit of the laws of the State, and it ought, on that account, to be required to contribute as taxes its fair share towards the support of the government whose benefits extend to it, not merely casually, but regularly and continuously, while it continues to be so located, as does other like property of residents of the State. Upon principles of common justice, every property-owner should contribute to the support of the government that protects and renders his property valuable and useful his fair proportion of money as a consideration therefor, unless, for some proper cause, he is excused from doing so *Alvany* v. *Powell*, 2 Jones' Eq., 51; *Redmond* v *Commissioners*, 87 N. C., 122, and numerous cases there cited; *Worth* v. *Commissioners*, 90 N. C., 409; *Ferry Co.* v. *Pennsylvania*, 114 U. S., 196; *Thompson* v. *Pacific Railroad Co.*, 9 Wall., 579; *Railroad Co.* v. *Peniston*, 18 Wall., 5; *Telegraph Co.* v. *Texas*, 105 U. S., 400; *Telegraph Co.* v. *Massachusetts*, 125 U. S., 530; *Leloup* v. *Port of Mobile*, 127 U. S., 640.

If the State were absolutely sovereign in all respects, it might tax property coming into it temporarily from another State for the purpose of trade, or property passing across its territory from one State to another or other States in the course of trade. travel and commerce. It might tax such trade and travel in the discretion of its Legislature. But as a member and constituent part of the Federal Union, it does not possess unlimited powers of taxation as to all property, matters and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its Courts of Justice, are bound by the Constitution of the Union, and it is its and their duty to observe, administer and enforce its provisions in proper cases and connections, as much so as its own Constitution and laws. Indeed, the Constitution of the United States is a part of the organic law of this State, and, in principle and theory, there is not, and cannot be, any conflict between the Constitution and laws of the United States and the same of this State. If conflict, in fact, exists in any respect, as, unhappily, is sometimes the case, this is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application, or wilfully disregard and disobey it.

A leading and very important purpose of the Federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly for the present purpose, between and among the several States comprising it. To this end it is provided in its Constitution, Art. I, §3, par. 3, that "the Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes." The power thus conferred is indefinite as to its scope, and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects, but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights and convenience of the States. Very certainly the provision implies that Congress shall *regulate* such commerce and the State shall not; that Congress shall do so effectually, in such way and by such means as will secure, promote and encourage the same, and that the States shall not, if disposed to do so, interfere with, destroy, hinder or delay the same, or divert it in any way by any legal constraint for their own advantage, otherwise than to a very limited extent, as allowed by the Constitution. Hence, it is settled that a State cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means and appliances employed and used in connection therewith, coming into that State from another temporarily, however frequently, and returning to such other State; nor can it tax such commerce, or such incidents thereto, passing across it from another or other States to another or other States, however often this may be done. And the reason is, that to so tax such commerce and the incidents thereto, including such means of transportation, would tend directly, and have the effect in a greater or less degree and like extent, to interfere with the freedom of commerce among and between the people of the States It would have the certain effect to embarrass, hinder and delay the free course of such trade. If a State could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and, in possible cases, prevent it from passing freely into other States. Moreover, if one State might tax it, every State through which it passes might do so likewise, and thus the power of Congress to regulate inter-State trade and commerce would be nugatory and a sheer mockery. It is clear that a State has no such power, and the Supreme Court of the United States has authoritatively so decided, directly and in effect, in many cases. *Hayes* v. *Steamship Co.*, 17 Howard, 596; *Morgan* v. *Parham*, 16 Wall., 471; *Ferry Co.* v. *Pennsylvania*, 114 U. S. Rep., 196, and numerous cases there cited; *Pickard* v. *Pullman Co.*, 117 U. S. Rep., 31; *Leloup* v. *Port of Mobile*, 127 U. S. Rep., 640.

The statute (Acts 1887, ch. 137, §§ 44–51), properly interpreted, does not, and was not intended to, embrace and to tax the property of the defendant put in question by this appeal. It had reference to and embraced property of corporations, whether resident or not, whose property was situated, had a *situs*, in this State, and was thus subject to be taxed. But the property in question was not, in a legal sense, located—situated—in this State; it had no *situs* here. It was the property of a non-resident corporation, employed and used by it constantly for the purposes of transportation in the course of the conduct of inter-State trade and commerce coming into and passing across this State from another and other States to and into another and other States It was not stationary, but constantly in *transitu* from one State to another The mere fact that property of the defendant of the value mentioned was continuously within the State, did not give it a *situs* here; it was continually changing, and in *transitu* in the course of inter-State commerce. It was so continuously in the State, day and night, because of the great volume of trade and travel passing over the defendant's road into and across this State going to other States. It is true, as suggested on the argument, that such property receives protection from this State, and has benefit of its laws, but, nevertheless, it is not the subject of taxation, because the Constitution of the United States will not, as we have seen, allow it to be made such subject. Judgment affirmed.

No error.

W. H. REAVIS et al v. GEORGE ORENSHAW et al.

Contract—Rescission—Evidence—Damages—Assignment—Notice—Judge's Charge.

1. In an action to declare, among other things, a contract rescinded, plaintiffs proposed to show that defendants offered to compromise the matter; the defendants, without objection, had already testified that, after failing to make settlement with plaintiffs, they had offered to accept a sum by way of compromise: *Held*, that while, generally, an offer of compromise is incompetent evidence, inasmuch as it was irrelevant in this case, its admission could not prejudice defendants, and was harmless.
2. Where it appeared from the evidence that both plaintiffs wrote to one of the defendants and asked him not to ship certain machinery previously ordered and contracted for, and the machinery was not shipped, and there was also an offer by the plaintiffs to pay damages: *Held*, there was some evidence to go to the jury of a rescission of the contract.
3. Failure to produce a note or paper on trial, which ought to have been produced, is a circumstance which the jury may consider in passing upon any alleged fact which would be made to appear or not appear by its production.
4. Where, upon an issue of damages for advertising for sale land embraced in a deed of trust securing a contract which had been rescinded, there was no evidence to go to the jury by which to determine the amount of damages: *Held*, that the charge of the Court that "if the jury shall decide that plaintiff is entitled to damages, the measure of his damages will be his loss resulting from inability to sell his land," etc., was error, and entitles defendant to a new trial.

CIVIL ACTION, tried at Spring Term, 1890, of VANCE Superior Court, *Armfield, J.*, presiding.

In a complaint filed by the plaintiff Reavis, it is alleged, in substance, that in November, 1885, he and Joseph H. Edwards contracted with the defendant Orenshaw, agent of the defendant Farquhar, for the purchase of certain machinery, at the price of $2,208—$208 to be paid in cash and the balance in three equal intallments at six, twelve and eighteen months from date of shipment, with eight per cent. interest, and that they executed their notes for said payments; that at the same time, in addition to the said machinery, the title to which was to be retained till the purchase-money was paid in full, the plaintiff Reavis conveyed to the defendant Orenshaw certain land, mentioned in the complaint, in trust, to secure the payment of the purchase-money, with power of sale; that within four or five days after the execution of the said contract and deed, and "before the defendants had even attempted to begin packing the goods for shipment," the plaintiffs, having ascertained that they could not secure a sufficient sum to make the cash payment of $208, wrote to the defendant Farquhar, who lived in York, Pennsylvania, and "countermanded the order and offered to pay them any costs and damages they had sustained"; that after that time the plaintiff heard nothing from Farquhar; the machinery was never shipped, and he thought that Farquhar was satisfied; but, notwithstanding the countermand of the order and the non-shipment of the machinery, the defendant Orenshaw, as trustee, &c., has advertised the land of the plaintiff, conveyed in the deed of trust, to be sold, &c., and he asks that the defendant Orenshaw be restrained, &c.

The defendant Orenshaw answers, substantially admitting the contract as alleged, but denying the other allegations and averring that, some time after forwarding the contract to Farquhar, and after the preparations for "filling the contract were well under way" and the machinery in course of construction, he was notified by Farquhar that he had received a letter from the plaintiff directing "the shipment of the machinery to be stopped, and asking to be released from the contract of purchase." The defendant, as agent of

Farquhar, saw the plaintiffs and attempted to procure a settlement, but they persistently refused; that he has no interest in the matter, except as trustee; that he is informed and believes that one of said notes was assigned to E. P. Stair, cashier of the Farmers National Bank of York, Pennsylvania, by Farquhar, before maturity and without notice, &c.; that, by the terms of the deed executed to him, he is to sell, upon default, at the request of the said Farquhar or his assigns; that he has been requested by Farquhar and said Stair to sell, and admits his purpose to do so, unless restrained, &c.

A temporary restraining order was granted, which was afterwards continued to the final hearing.

By an order in the cause, J. H. Edwards was made party plaintiff, and E. P. Stair party defendant.

An amended complaint was filed, setting forth that E. P. Stair claimed to be the owner of one of the notes, and that "he alleged that it was transferred to him before maturity." It was further alleged that, by reason of the action of the defendants in advertising the land of the plaintiff Reavis, he had sustained damage, &c.

The defendant Farquhar filed a separate answer, admitting, substantially, the contract as alleged in the complaint, and that Orenshaw had advertised the land for sale, but denying the other allegations; and for a further answer, he says, in substance, that he has incurred expenses and liabilities to the amount of $800, which will be a total loss to him if the prayer of the plaintiffs is granted; that he never consented to a change or rescission of the contract, &c.

The defendant E. P. Stair also filed a separate answer, denying knowledge or information sufficient to form a belief as to most of the allegations of the complaint, but he is informed and believes that the promissory notes became due at six, twelve and eighteen months after date, respectively, and that they are secured by the trust. He also says that he is the owner of the note for $667, due twelve months after date, and admits that he has called upon the trustee to sell, &c.

In response to the issues submitted, the jury say—

1. That the defendant Farquhar agreed to a rescission of the contract.

2. That he sustained no damage by the rescission.

3. That the note for $667 was not assigned to E. P. Stair before maturity, and for value, and without notice of the plaintiffs' equity.

4. That the plaintiff Reavis has sustained damage by reason of the wrongful acts of the defendants, to the amount of twenty dollars.

There was judgment for the plaintiffs, and the defendants appealed.

Upon the trial, the plaintiffs having notified the defendants to produce the notes and letters referred to in the pleadings, copies were introduced, as were also the contract of purchase and deed of trust.

J. H. Edwards, one of the plaintiffs, testified that four or five days after executing and forwarding the contract, notes and deed of trust, he wrote to the defendant Farquhar "that plaintiffs could not raise the money to meet the cash payment; asked him not to ship the machinery, and they would pay him damages." No answer was received, nor was the machinery shipped, and plaintiff understood Farquhar to agree to his proposition for these reasons.

"Being cross-examined, he stated that all plaintiffs' dealings with Farquhar had been through his agent, George Orenshaw; that this letter was the only direct communication with him, that witness knew of; that a few days after writing that, the agent, Orenshaw, came to witness about the matter, and tried to settle it, but no agreement was reached. Witness told Orenshaw that he did not propose to pay any damages, but thought Reavis ought to pay something—at least the attorneys' fees for arranging the contract and deed of trust. Orenshaw spoke to the witness two or three times about the matter, and showed him a letter from Farquhar about it. When the six-months note fell due it was presented by the bank for payment, but was not paid. After the note was sent back by the bank, Farquhar sent an agent here from York, Pa., who tried to settle the matter with plaintiffs, but they could not agree as to the amount of damages, and no agreement was ever reached.

"On his re-direct examination, plaintiffs proposed to show by the witness that the defendant Farquhar, through the agent sent out from York, Pa., offered to settle with plaintiffs for $200. Defendants objected. Objection overruled, and defendants excepted."

"Witness then testified that Farquhar's agent offered to settle and give up the deed and notes for $200; does not remember that anything was said about one of the notes being assigned to E. P. Stair."

The other facts necessary to an understanding of the matters passed upon are stated in the opinion.

Messrs. A. C. Zollicoffer and *C. M. Cook*, for plaintiffs.
Mr. T. M. Pittman, for defendants.

DAVIS, J.—after stating the case:

1. We do not understand counsel for the plaintiff to controvert the settled principle that when an offer of compromise is made and rejected, the rights of the parties remain, without prejudice, precisely as they were before the offer; but they insist that the evidence is rendered competent by what was said on the cross examination.

The defendant Farquhar, whose deposition (taken before the trial) was read, testified, without objection, that after he had been unable to effect a settlement with Reavis and Edwards, "who pleaded their poverty, among other reasons, for not making a settlement, I promised to take $200 in full settlement of the whole amount due me, and pay off the discounted note and return it with the others"; and we are unable to see how the testimony objected to could prejudice the defendant.

2. The second exception is to the submission of the fourth issue which relates to alleged damages sustained by Reavis. The issues are made by the pleadings, and, as the complaint alleges and the answer denies, that Reavis has sustained damage, the issue was a proper one Whether his Honor should have instructed the jury that there was no sufficient evidence to sustain the allegation, is a different question, as will be seen, when we come to consider the exception to his charge in relation thereto.

3. The third exception was to the refusal of his Honor to instruct the jury, "That there was no evidence of any agreement on the part of A. B. Farquhar to the rescission of his contract with the plaintiff."

Both Edwards and Reavis testified that Edwards, within four or five days after the contract was made, wrote to Farquhar, "asking him not to ship the machinery, and offering to pay damages"; that the machinery was to be sent within seven days from the time they sent the contract, and as the machinery was not shipped, and no answer received, they understood the request not to ship the machinery to have been agreed to by the defendant.

It appears from the testimony of both Edwards and Reavis that they wrote to Farquhar, "asking him not to ship the machinery and offering to pay damages." It further appears that the machinery was not shipped, and much of the evidence sent up with the record, and which we deem it unnecessary to set out, relates to a controversy between the parties as to the amount of damages sustained by the defendant. Orenshaw testified that "the letter from plaintiffs to Farquhar, asking him not to ship the machinery and let them pay damages was sent to him, with instructions to see the plaintiffs and make some settlement, and that he tried to settle with them and never succeeded." The plaintiffs, in their letter, promised to pay damages, and the subsequent controversy seems to have related only to that question.

The defendant Farquhar did not ship the machinery, and whatever may have been the amount of damages sustained by the defendant, we think there was some evidence to go to the jury upon the question of the rescission of the original contract. The plaintiffs made an offer to pay damages, asking defendant not to ship the machinery under the contract' and if the defendant agreed to this, and did not ship the machinery in consequence of it, the failure, thereafter, to agree upon the amount of damages would not affect the question of rescission.

4. The fourth exception related to the latitude permitted plaintiff's counsel in the course of his closing argument. It does not appear that his Honor was requested to interpose and stop counsel, and he instructed the jury, "in substance, to consider the evidence without reference to any prejudice," which removed the objection.

The fifth, sixth and seventh exceptions are embraced in the following charge to the jury, and indicate—

5. That they might consider the testimony and determine, from all the circumstances, whether the defendant Farquhar agreed to rescind his contract with the plaintiffs; that he had a right to ship the goods and hold plaintiff to their contract, but if the jury should find that the negotiations between Farquhar's agent and the plaintiffs for a settlement, subsequent to the letter from plaintiffs to Farquhar, had sole reference to the question of damages, that fact might be considered, in connection with his not shipping the machinery, as tending to show his agreement to the rescission.

6. That, after notice to the defendant to produce the notes, or bonds, given by plaintiffs to A. B. Farquhar, it was the duty of the defendant to produce them, and the jury may consider their failure to produce them, after such notice, as evidence tending to show that the one due twelve months after date had not been assigned to E. P. Stair before maturity.

7. That upon the question of damages, if the jury shall decide that the plaintiff Reavis is entitled to damages, the measure of his damages will be the loss resulting in his inability to sell his land because of the defendant's deed of trust (seventh exception).

As to the fifth exception, we think the charge of his Honor was warranted by the evidence, to which we have already referred, and there was no error.

As to the sixth exception, the notes were in the possession or under the control of the defendant, and if, after notice, they were not produced, the jury might consider that as a circumstance, in passing upon any alleged fact which would be made to appear, or not appear, by the production of the notes themselves; and of this the defendant would have no right to complain. It will be observed that the defendant Stair does not allege that the note was transferred before maturity and without notice, but there was no objection to the issue.

As to the seventh exception, there was no evidence to warrant the charge of his Honor as given. The only evidence in any way bearing upon the question is that of the plaintiff Reavis, which is as follows: "I think it was about a year ago that my land was advertised by Orenshaw; I have been damaged by the property being advertised, and by its being tied up with this deed of trust; I had a chance to sell the land at a good profit."

On his cross-examination, he said that "the notes had never been returned to him, and the deed of trust had never been cancelled; that he had never called upon either Farquhar or Orenshaw for their surrender and cancellation; that at the time he had an opportunity to sell his land there were judgments against him, two or more of them docketed in the Superior Court Clerk's office, and a lien on his land of small amounts, and his land was worth $800."

This was all the evidence in any way relating to the question of damages to the plaintiff, and it presented the jury with no *measure*, great or small, by which to determine the amount of damages, if any, sustained by the plaintiff. His original complaint made no demand of judgment for damages, but only asked that the defendant Orenshaw be restrained from selling or disposing of the property until the question as to the amount due the defendant, if any, could be passed upon and ascertained.

There was error in the charge excepted to, and the defendants are entitled to a new trial.

Error.

LAURA V. AVENT et al. v. S. S. ARRINGTON et al.

Deed—Probate and Registration—Delivery—Color of Title—Possession—Findings by the Court—Declarations Against Interest—Evidence.

1. When a certificate of probate is not sufficient to entitle the instrument to registration, if a party make it part of his pleading he waives the question of its admissibility.

2. So likewise, defendants' admission that a paper-writing in question is the one attached as an exhibit in the pleadings, relieves the plaintiff of proving its contents, but its delivery and sealing may still be disputed.

3. Where a deed is proved and registered there is a presumption of *proper* delivery, nothing more appearing.

4. An instrument, though signed, is not available to prove color of title, unless it is delivered.

5. The delivery of a paper-writing, offered to show color of title, may be proved by parol, and its probate and registration is not essential to such proof.

6. *The Code*, §1245, amended by Laws of 1885, ch. 147, making a contract for sale of land inadmissible without registration, does not make registration essential to the use of a deed to show color of title, where there is a claim and possession under it.

7. Possession, under color of title, works notice to purchasers.

8. The conclusions of the Court below as to the fact of delivery, supported, as it was, by some evidence, will not be reviewed in this Court.

9. Declarations of grantor of delivery, being against his own interest, are admissible to show it.

[Discussion of the Doctrine of Color of Title, by AVERY, J.]

This was a CIVIL ACTION, tried before *Connor, J.*, at Spring Term, 1889, of the Superior Court of NASH County.

The findings of fact, conclusions of law, and judgment were as follows:

On the 18th day of January, 1848, Nicholas W. Arrington, being the owner in fee of the real estate described in the complaint, signed and delivered unto Elizabeth F. Wright, his daughter, and the then wife of W. T. Wright, the paper-writing, a copy whereof is as follows:

"This indenture and deed of gift, made this 18th day of January, one thousand eight hundred and forty-eight, between Nicholas W. Arrington, of the county of Nash and State of North Carolina, of the one part, and Elizabeth F. Wright, of the county and State aforesaid, of the other part—

"Witnesseth, That, for and in consideration of the love I have for my daughter Elizabeth F. Wright, I have this day given, granted, aliened and delivered to the said Elizabeth F. Wright one tract of land adjoining the lands of Wm. T.

Wright, myself and others, and bounded as follows (describing it), which said tract of land I value and assess to my daughter Elizabeth F. at the sum of twelve hundred and fifty dollars, without interest, and also the following negro slaves, viz., Selah, aged about forty-five; Chaney, aged about sixteen; Angeline, aged about fourteen; Rose, aged about twelve; Thomas, about ten; Anthony, about eight; Milly, about five; and Charity, about eighteen months, which said negro slaves I also give to my daughter Elizabeth F. Wright, them and their increase from this day forward, and to be received by her as likely only assessing the eight negroes without interest or increase as here described, and the same rates or price as my other negroes may be valued and assessed to my other children, in case or provided I should die intestate; and I furthermore give, grant and deliver to her, my daughter Elizabeth F. Wright, and Wm. T. Wright, her husband, all the other property heretofore delivered to them, consisting of furniture, stock, provisions, &c., which I here assess at the sum of four hundred dollars, which is to carry on interest, and which said money, land and negroes I give to her, my daughter Elizabeth F., her heirs, assigns, forever, as a part of her proportionable part of what I may or hereafter be able to give my children.

"In evidence of which, I herewith set my hand.

"NICHOLAS W. ARRINGTON."

There is no seal attached to or following the signature of the said N. W. Arrington, nor is any seal to be found upon any part of said paper-writing. This fact is found by an inspection of the original document or paper-writing, there being no other testimony offered in respect thereto. The plaintiffs contended, as a matter of law, that a seal was to be found upon said paper-writing. To the end that the question may be presented to the Supreme Court for review, the Clerk is instructed, if the plaintiffs so desire, to send with the transcript the original paper-writing, or a photographic copy thereof.

Upon the delivery of the said paper-writing, the said Elizabeth F. Wright, together with her said husband, entered upon and remained in the possession of the land therein described until the execution of the deed hereinafter set forth, to-wit, November 16th, 1857.

Said paper-writing was admitted to probate and registered in the county of Nash on the 29th day of December, 1885.

On the 16th day of November, 1857, W. T. Wright, the husband of the said Elizabeth, executed and delivered unto John F. Speight the deed, a copy whereof is as follows (the land described in the complaint and the said paper-writing is enclosed within the boundaries described in the said deed):

"This indenture, made this the 16th day of November, one thousand eight hundred and fifty-seven, William T. Wright, of the county of Nash and State of North Carolina, of the one part, and John F. Speight, of the county of Edgecombe and State aforesaid, of the other part—

"Witnesseth: That for the consideration of four thousand five hundred dollars, to him, the said William T. Wright, in hand paid by the said John F. Speight, hath this day bargained, sold and delivered to the said John F. Speight, one tract of land, and known as my residence in said county of Nash, adjoining the lands of N. W. Arrington, A. H. Arrington and others, and bounded as follows, to-wit (describing it): To have and to hold the same, with all the privileges, advantages, appurtenances thereunto belonging, to him, the said John F Speight, his heirs, assigns, &c., forever, against the claims of all other persons whatever; and in evidence of which I do for myself, heirs, assigns, warrant and defend the same, the day and date before written.

"WM. T. WRIGHT." [Seal.]

"And signed and acknowledged in the presence of—
Witnesses: N. M. HARRIS and JOHN G. ARRINGTON."

At the time of the execution of the said deed by W. T. Wright, N. W. Arrington wrote and signed an indorsement thereon in the following words, to-wit:

"N. B.—Whereas, a portion of the above tract was presented by me to the said William T. Wright and Elizabeth, his wife, I do therefore now, for myself, and also for my daughter Elizabeth, relinquish, deliver, warrant and defend her interest in said land in compliance and according to the above said deed, and in evidence of which I have hereunto set my hand, &c., the day and date above written.

"NICHOLAS W. ARRINGTON." [Seal.]

"And assigned in the presence of—
Witnesses: N. M. HARRIS and JOHN G. ARRINGTON."

This deed was admitted to registration March --, 1861.

John F. Speight paid a full and valuable consideration for the said land and went into possession thereof upon the delivery of said deed, and he, and those claiming under him, including the defendants (except those who disclaim in the answer), have remained in possession thereof until the commencement of this action.

The defendants (except those disclaiming) claim and are entitled to all of the interest and estate in said land which may have passed to or vested in the said John F. Speight, by virtue of the aforesaid deed from W. T. Wright to him, or the endorsement thereon by said N. W. Arrington. The said defendants also claimed and are entitled to and interest which may have accrued to the said John F. Speight or his assignees by lapse of time or otherwise.

Prior to his death, the said Nicholas W. Arrington made and published his last will and testament, the third item whereof is in the following words, to-wit: "I will and direct my two tracts of land east of said road, the one known as the 'Harper place' and the other known as the 'Doles place,' in front of Daniel Sumner's, containing about one hundred and thirty-five acres each, to be sold, at my death, by my hereinafter-named executors, and the annual interest arising therefrom to be applied to the wants and comfort of my unfortunate son, Nicholas W. Arrington, during his natural life."

The above mentioned land is a part of the land described in the paper-writing executed by said N. W. Arrington to said Elizabeth Wright, which he had purchased from the grantees of said John F. Speight.

The sixth item of said will is in the following words, to-wit:

"I will and direct that no part of my estate, real or personal, go to my daughter Elizabeth and her husband, W. T. Wright, for cause, that I have done by past gifts equal justice with my other children."

W. T. Wright died August 25th, 1886, his wife Elizabeth having died during the year 1872, leaving the plaintiffs, her children and heirs at law. The defendants all disclaim except W. W. Arrington and B. L. Arrington. Neither claim or have any interest in the said land.

The Court, upon the foregoing facts, being of the opinion, "that the legal title to said land in controversy did not pass to, or vest in, the said Elizabeth Wright by virtue of the paper-writing set forth, the same not being under seal, but that she acquired an equitable estate in fee in said land; that said paper-writing operated in equity as a covenant to convey said land, and, as such, was supported by a meritorious consideration.

"That John F. Speight acquired no interest, title or estate in said land by virtue of the deed from W. T. Wright, or the endorsement thereon by N. W. Arrington, as against the said Elizabeth F. Wright

"That upon the death of said Elizabeth F. Wright, the equitable title descended to her heirs at law, the plaintiffs, subject to the life estate of said W. T. Wright, as tenant by the courtesy, and his interest vested in the defendants by way of estoppel.

"That upon the death of said W. T. Wright, the right to the possession of the said land descended to the plaintiffs. That they are not bound by the statute of limitations, nor is there any presumption of an abandonment of their rights or equities. That the certificate of probate on said paper-writing is not sufficient to entitle it to registration, but the same being made a part of the answer, the question of its admissibility does not arise.

"It is thereupon adjudged that the plaintiffs recover of the defendants, except those who disclaim, the possession of the said land described in the complaint. That the question of rents and profits, and the amount for which each defendant is liable, be ascertained by the Clerk of this Court, who is hereby appointed a referee for that purpose; that plaintiffs have a writ of possession from the Clerk of this Court for the said land, and recover their costs in this behalf expended, except as to the defendants who disclaim, to be taxed by the Clerk. That this cause be retained until the report in regard to the rents is confirmed," etc.

From the foregoing judgment the defendants, except those who disclaim, appealed to the Supreme Court.

The following errors are assigned by the defendants:

1. That they denied the execution of the alleged deed from N. W. Arrington to Elizabeth F. Wright, and also denied the title of the plaintiffs to the *locus in quo*, and that they, the said defendants, also pleaded matters in avoidance, and that it was error for the Court to disregard the denials, and adjudged that the answer admitted the execution of the instrument.

2. That the Court erred in finding, as a fact, that said alleged deed was delivered to said Elizabeth F. Wright. The only evidence on this point was as follows: The paper-writing was introduced by the plaintiffs, but the defendants insisted that it was not validly and legally probated and recorded, and cannot, therefore, prove delivery. The Court did not pass upon or adjudge the validity of the certificate of probate, being of the opinion that, by the pleadings, the only question presented was the right of the plaintiffs upon the paper-writing as set out in the pleadings. W. F. Howerton testified that this paper-writing was handed to him by W. T. Wright, in the fall of 1885, and that he agreed to recover the land for one-half of it, and that he afterwards had the instrument recorded. Other witnesses introduced by the plaintiffs testified that Elizabeth F. Wright and her husband were in possession of the land from 1848 until November, 1857, and that ever since then John T. Speight, and those claiming under him, had been in possession.

3. That his Honor erred in deciding that said paper-writing was admitted to probate and registration December 29, 1885. The defendants insisted that the probate is insufficient, and the registration unauthorized and void. The witness (John J. Drake) does not state by what means he had acquired a knowledge of the handwriting of the said N. W. Arrington, nor that he had, in any way, ever acquired such knowledge; nor even that said N. W. Arrington was dead at the time of the so-called probate. No other registration of the instrument being proven, the defendants insisted that, as against them, it was null and void, under chapter 147, Acts 1885.

4. That his Honor erred in deciding that said Elizabeth F. Wright, by virtue of said paper-writing, acquired an equitable estate in fee in said land, and that said paper-writing operated in equity as a covenant to convey. The

defendants insisted that even if said paper-writing was delivered to said Elizabeth F. Wright, she had under it, as against N. W. Arrington, only an equity for specific performance, or to compel a correction of the instrument, and the re-execution of the same in a proper form, and that this equity was inferior to that of Speight, or his grantees, the defendants, arising under a contract *in rem.* for full value.

5. That his Honor erred in deciding that said equity in favor of Elizabeth F. Wright, or her heirs, the plaintiffs, had not been presumptively abandoned under Revised Code, ch. 65, § 19.

6 That his Honor erred in deciding that John F. Speight acquired no interest, title or estate in said land by virtue of the deed from W. T. Wright, or the indorsement by N. W. Arrington, as against the said Elizabeth F. Wright.

7. That his Honor erred in deciding that upon the death of said Elizabeth F. Wright, the equitable title descended to her heirs at law, the plaintiffs, subject to the life-estate of said W. T. Wright as tenant by the courtesy, etc.

8. That his Honor erred in deciding that, upon the death of said W. T. Wright, the right to the possession of the said land accrued to the plaintiffs.

9. That his Honor erred in holding that the execution of the said paper-writing was admitted by the answer.

10. That his Honor erred in not declaring that there was no evidence of the delivery of said paper-writing to said Elizabeth F. Wright, and that while her father may have intended to give her the land, he never effectuated, but abandoned, that intention.

Paragraph two of the complaint is as follows: "That on the said date the said N. W. Arrington executed a deed conveying in fee-simple said land to Elizabeth F. Wright, his daughter, who was then the wife of W. T. Wright, and the said Elizabeth F. Wright shortly thereafter entered into the possession of said land."

Paragraph two of the answer is as follows: "That paragraph two of the complaint is not true It is admitted that the said Nicholas W. Arrington, on the 18th of January, 1848, signed a paper-writing, but the defendants deny that said document was either sealed or delivered. It is admitted that the said Elizabeth F. Wright and her husband, William T. Wright, occupied said land and appropriated the rents and profits until the 16th day of November, 1857, by permission of her father, N. W. Arrington, but it is denied that the said Elizabeth F. Wright or her husband had any title to the premises."

The complaint was amended by inserting paragraph seven, which is as follows: "The plaintiffs further say that if it shall be found, upon inspection of the paper-writing alleged to be a deed, in the second article of this complaint, executed by N. W. Arrington to Elizabeth Wright, has not a seal affixed to the name of N. W. Arrington, and is, therefore, not a deed, then these plaintiffs allege that at the time of the execution of said paper-writing, which is made part of this complaint, the said N. W. Arrington was possessed of real and personal property of great value, and that immediately after the execution of said writing, the said Elizabeth Wright took possession of the personal property, and was thereafter, until their emancipation, in possession of the slave property; and she likewise, immediately after the execution of the said paper-writing, entered into the possession of the land mentioned therein, the same that is in controversy by this suit, and she so remained in possession thereof until some time in the year 1857, when her husband, without her assent, executed a deed to one John F. Speight, purporting to convey the said land in fee-simple, the said Elizabeth refusing to join in the execution of the said deed. The said John F. Speight had notice at the time of, and before the execution of said deed, of the interest and title of the said Elizabeth in said land, and those claiming under him had the same notice. N. W. Arrington died in 1861, leaving a last will and testament, and although possessed of a large estate, he did not devise or bequeath anything to his said daughter, Elizabeth Wright, stating as a reason for his failure so to do, in his said will, that he had done her equal justice with his other children by private gifts. That the gift embraced in said paper-writing is all that he ever gave her, and these plaintiffs are advised, and so aver, that if their mother did not have the legal title to said land, that she had the equitable title thereto, which descended, upon her death, to the plaintiffs, as her heirs at law, subject to a life-estate in favor of their father, the husband of said Elizabeth Wright, to-wit, W. T. Wright, and that upon his death in August, 1886, that they became entitled to the possession of said land."

To this, the defendants answer: "That paragraph seven of the complaint (amended at Spring Term, 1889), is not true."

Mr. C. M. Cooke, for plaintiffs.

Messrs. Jacob Battle, *J. B. Batchelor* and *John Devereux, Jr.*, for defendants.

AVERY, J.—after stating the facts: The defendants, in their answer to the amended complaint, deny the allegation that N. W. Arrington executed a deed on the 18th day of January, 1848, to his daughter, Elizabeth F. Wright, under whom the plaintiffs claim, for the land in controversy, and aver that the said Arrington, on that day, "signed a paper-writing, but they deny "that said document was either sealed or delivered." The plaintiffs, in their amended complaint (paragraph seven), allege that "if it shall be found, on inspection of the paper-writing alleged to be a deed in the second article of this complaint, executed by N. W. Arrington to Elizabeth Wright, has not a seal affixed to the name of N. W. Arrington, and is, therefore, not a deed," &c., then that the said Elizabeth entered into the possession of the land described in said paper, immediately after its execution in January, 1848, and occupied and held possession of it until some time in the year 1857, when her husband conveyed it, without her assent, to John F. Speight, under whom the defendants claim.

The Judge below held "that the certificate of probate on said paper-writing is not sufficient to entitle it to registration, but the same being made a part of the answer, the question of its admissibility does not arise." The admission contained in the second paragraph of the answer, that N. W. Arrington, on the 18th day of January, 1848, signed a paper-writing, is one that relieves the plaintiffs of the burden of proving the contents of the paper and the genuineness of Arrington's signature. The defendants thus introduced the paper, reserving only the right to controvert the sealing and delivery of it. The plaintiffs, in their amendment to the complaint, do not insist that there was a seal to the instrument, and the only disputed question of fact left for his Honor was, whether there was sufficient evidence of the delivery to Elizabeth Wright. If the Judge had found the fact only that the deed had been proven and registered, without mentioning the form of registration, the presumption would have arisen that it was in proper form, and that it was delivered. *Patterson* v. *Wadsworth*, 94 N. C., 538; *Redman* v. *Graham*, 80 N. C., 231. The Judge states, as a conclusion of law, after examining the certificate, that it is insufficient in form to meet the requirements of the statute. Though we concur with him that, by appending the paper as an exhibit to the answer, the defendants waived objection to its admissibility, subject to the reservation as to delivery contained in the answer, it would not follow that the acknowledgment that it was signed would make it available, even as color of title, without satisfactory proof of delivery.

As there was no evidence of the requirement that the plaintiff should prove the delivery, the inquiry is naturally suggested, whether the paper-writing would be competent to show color of title upon parol proof of its delivery to Mr. Wright, or whether probate and registration are essential prerequisites to make it "good and available" in law for any purpose. This Court has construed §1245 of *The Code* (since amended by ch. 147 of the Laws of 1885) as making a contract for the sale of land inadmissible without registration in an action brought to enforce a specific performance of it. *White* v. *Holly*, 91 N. C., 67. But in the case of *Hunter* v. *Kelly*, 92 N. C, 285, the Court said that "the registration was not indispensable to the use of the deed, as constituting color of title, but proof of its execution was sufficient to give it effect. The distinction evidently intended to be drawn was, that while neither "deed nor contract to convey land nor lease for more than three years should be available to vest an estate, or pass an interest by the mere force of the instrument before registration, the statute was not repugnant to the established rule that a paper-writing, constituting in law color of title, accompanied by continuous adverse possession by the person claiming under it for the period prescribed by law, raises a presumption of a perfect title in the occupant, and is admissible in evidence without registration when offered for that purpose. *Hardin* v. *Barrett*, 6 Jones, 159; *Campbell* v. *McArthur*, 2 Hawks., 33; *Chastien* v. *Philips*, 11 Ired., 255. The law thus interpreted works no injury to purchasers, because the fact that another is in possession is sufficient to put those who propose to purchase on inquiry, and is justly held to be constructive notice of his claim. *Mayo* v. *Leggett*, 96 N. C., 237.

So that it only remains for us to discuss and determine two questions—first, whether there was any evidence to support the finding that the paper-writing was delivered; and, second, whether, if delivered to her, it constituted color of title.

The endorsement by N. W. Arrington on the deed was a declaration of his against his own interest, and was some evidence that he delivered the instrument to his daughter. It is not necessary that we should adduce any other testimony bearing upon the question, as it was the province of the Judge to pass upon the weight of that offered, and his conclusions of fact, if we find any support for them in the evidence, will not be reviewed in this Court. *Burke* v. *Turner*, 85 N. C., 500.

In *Ellington* v. *Ellington*, 103 N. C., 54, the late Chief Justice SMITH, delivering the opinion, approves the definition of color of title given by Judge GASTON in *Dobson* v. *Murphy*, 1 D. & B., 586, to which Chief Justice RUFFIN agreed, with great reluctance, because it was not made broad enough to comprehend any written evidence of title accompanied by possession. That definition is as follows: "Some written document of title purporting to pass the land, and one not so obviously defective that it would not have misled a man of ordinary capacity" Earlier and latter adjudications of this Court are in accord with *Dobson* v. *Murphy* See *Tate* v. *Southard*, 3 Hawks, 121; *Keener* v. *Goodson*, 89 N. C., 277.

If the paper-writing relied on in our case comes within the description of color of title, the only remaining question of any importance is settled. We think that it does. The reason that underlies the doctrine of maturing title by adverse possession under imperfect deeds or contracts is, that where one, in the exercise of ordinary care and intelligence, is induced to enter upon and cultivate, and sometimes improve land, because he has some written evidence of title that would naturally induce a man, not trained in the law, to believe that it vested in him what it professed to pass, it would be unjust to recognize or enforce the right of another who brings no action till the end of the statutory period. Wood on Lim., § 159.

The Supreme Court of Georgia hold that any writing which defines the "extent of the claim" is "a sign, semblance or color of title." *Field* v. *Boynton*, 33 Georgia, 242.

The Supreme Court of New York hold that where one enters upon land under a contract of purchase, he holds in subordination to his vendor, and his occupation is an elongation of the possession of his vendor till the purchase-money is paid, but when the land is fully paid for the possession of the vendee becomes adverse to the whole world, including the vendor. *Whitney* v. *Wright*, 15 Wen., 171; *Briggs* v. *Person*, 14 Wen., 227.

The Supreme Court of Alabama held, in *Beard* v. *Ryan*, 78 Ala., 37, not only that the vendee's possession becomes adverse on payment of purchase-money, but that if the vendee sell before he has paid, a sub-purchaser who buys from such vendee and pays the stipulated price, and is put in possession, holds adversely to the original vendor. See also *Elliott* v. *Mitchell*, 47 Tex., 445; *Spilter* v. *Schofield*, 43 Iowa, 571; *James* v. *Patterson*, 62 Ga., 527; *Rutherford* v. *Hobbs*, 63 Ga., 243. But upon these questions the authorities of the different States are in conflict. *Ellege* v. *Cork*, 5 Lea (Tenn.), 622; *Con* v. *Faupel*, 2 W. Va., 238. A majority of the Courts of this country concur in the opinion that, where a man enters into the possession of land under a written contract of purchase, and has, under such agreement, the right to demand the conveyance of the legal title to said land, his possession will be deemed adverse to all the world, and his title will begin to mature when his right to make such demand accrues. Wood, in his work on Limitations of Actions, § 260, after a review of the authorities, states the rule as follows: "To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the entire title, for if it be subservient to and admits the existence of a higher title, it is not adverse to that title. But where a contract is made for the sale of land upon the performance of certain conditions, and the purchaser enters into possession under the contract, his possession from the time of entry is adverse to all except his vendor, and it seems now to be well settled that after the performance by him of all the conditions of the contract, he from that time holds adversely to the vendor, and full compliance is treated as a sale, and the parties in possession may acquire a good title, as against the vendor, by the requisite period of occupancy." These questions have been discussed, by way of illustration, and to show how far the Courts and leading law-writers of the country have gone in sustaining titles claimed under contracts of purchase with continuous possession; but we decide only the question directly involved in this controversy. Any of the definitions of color of title, however restricted, will, we think, include the writing upon which the claim of Elizabeth Wright is founded. It was in form a deed that purported to convey the entire estate in the land, and only one educated in the law could be expected to understand that a seal was necessary to make it, in reality, a deed, and vest the legal estate in the grantee. We find direct authority to sustain this view in the cases of *Barger* v. *Hobbs*, 67 Ill., 592, and *Watts* v. *Parker*, 27 Ill., 224, in both of which the Court held that while a paper purporting to be a deed was not valid for the purpose of conveying title unless it is under seal, yet when a person enters into possession under such a paper it is admissible in evidence for the purpose of showing the extent of his possession and what he claimed by it. Under that paper she held continuous adverse possession for more than seven years before her husband sold and conveyed to Speight in the year 1857, and the law gave her the title, raising the presumption that the legal, as well as the equitable estate, had been granted to her. *Rogers* v. *Mabe*, 4 Dev., 180; Wood on Lim., § 254; Washburn on Real Prop., 499; *Trim* v. *McPherson*, 7 Calder (Tenn.), 15. The claim to the land might have been abandoned by her at any time before a valid title was acquired by surrender of possession, but after her title ripened into a perfect one, the mere act of leaving the land did destroy it. She had acquired such an estate as could be transferred only by deed, and it descended to her heirs at law, at her death, in the year 1872. *School District* v. *Benson*, 31 Me., 381; 52 Am. Dec., 618. Under the provisions of § 1, ch. 56, Revised Code, W. T. Wright could convey his life estate, as tenant by the courtesy, without the joinder of his wife, in any land acquired by her before March 1st, 1849, and though she refused to join in the deed to John F. Speight, it was still effectual to pass an estate in the land for the life of William T. Wright, and no longer. Wood on Lim., § 259. He died August 25th, 1886, and the possession of those claiming under his deed was not adverse to her heirs until after his death. It follows, therefore, that the estate of the wife that descended to her heirs, subject to the life-estate of the husband, which passed by his deed to Speight, vested in the plaintiffs, and they held both the legal and equitable estate in the land, and, after the death of the husband, had a right to recover in this action, which was brought on the 12th of April, 1888. Adding to what we have already said in reference to the estate acquired by Elizabeth Wright by possession under the paper-writing, the further statement that said paper was not the less effectual as color of title, because it was not given for a valuable but for a meritorious consideration, we conclude that the judgment of his Honor should be affirmed, though we reach the same conclusion in a different way. *Rogers* v. *Mabe*, 4 Dev., 180.

It seems unnecessary to say that we need not follow the learned counsel in the line of discussion pursued by them as to the equities of the parties, when we hold that Mrs. Wright acquired a title to the land before she left it in 1857, upon which her heirs could recover in ejectment, were the principles of law and equity still, as formerly, administered separately.

Affirmed.

SAMUEL B. WATERS v. A. P. CRABTREE et al.

Deed, Absolute—Mortgage—Trustee—Contemporaneous Agreement—Registration—Notice—Lapse of Time.

1. A deed, absolute upon its face, may be treated as a mortgage, when it was agreed, *at the time of its execution*, that such should be its purpose. But the proof of this should be strong and satisfactory.

2. But if the purpose of the deed was to operate as a mortgage, it cannot have that effect against subsequent *bona fide* purchasers for value and without notice.

3. When such contemporaneous agreement is afterwards reduced to writing, it relates back to the execution of the deed.

4. When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed: *Held*, that subsequent purchasers for value, without *actual* notice, whose deeds were duly recorded, were not affected with notice of such registration.

5. Nor can re-registration of the defeasance in 1886, after the registration of the *mesne* conveyances to the innocent purchasers, avail to defeat their rights.

6. Where, in such case, plaintiff had notice of the registration of the *mesne* conveyances, and of possession of defendants under them for fifteen years, and all this time, and for eight years after paying the debt secured by the deed, he failed to register the defeasance or assert his claim: *Held*, he was guilty of gross negligence and not entitled to the relief of a Court of Equity.

This was a CIVIL ACTION, tried at the Spring Term, 1889, of the BEAUFORT Superior Court, *Boykin, J.*, presiding.

The purpose of this action is to charge the defendants, as trustees, holding the legal title to the land in question for the plaintiff, to compel them to convey such legal title to the plaintiff, and account for rents and profits, and to obtain possession of the land.

The plaintiff alleges, among other things, in the complaint—

"1. That on the 9th day of September, 1859, he was seized in fee and possessed of the land hereinafter described; that at the said time he was justly indebted to George A. Latham in the sum of ---- dollars; that he was anxious and desirous of securing the same; that to do so he conveyed to George A Latham a certain tract of land, lying, &c., (that in question); that the utmost confidence existed between plaintiff and said Latham; the said deed of September 9th was made absolute in form instead of in form of a security for debt; that it was agreed at that time that said Latham would reconvey said land to plaintiff upon the payment of the debt aforesaid.

"2. That on and before January 7, 1861, plaintiff had paid all of said debt except the sum of $1,702.59, and that on said date he gave his note for what remained due at that time, viz.: $1,702.59; that owing to the approach of war and uncertainties of the times and the enlistment of both parties to said deed, it was agreed on May 25, 1861, that said agreement should be put in writing; that in pursuance thereto the said George A. Latham duly made and executed a certain *defeasance*, which said defeasance was duly proved and recorded in Book No. 31, p. 488 of Beaufort County records, and a copy thereof is hereto annexed as a part of this complaint, and the original he is ready and willing to produce when required; that the premises referred to in said defeasance are the same as that described in section 1 of this complaint.

"3. That plaintiff did, on the 1st day of July, 1877, pay, take up and cause to be cancelled the note referred to in said defeasance," &c., &c.

The deed above mentioned, of September 9, 1859, was registered before the paper-writing called a "defeasance," whereof the following is a copy:

"WASHINGTON, N. C., May 25, 1861.

"Be it known to all men by these presents, that the brick store and premises, for which I hold a deed, given to me by Samuel B. Waters of the town of Washington and State of North Carolina, is held only to secure the payment of a certain note for seventeen hundred and fifty-nine dollars, dated January 7, 1861, in my possession. After payment of said note, I have no further right or title to said store and premises, and wish my heirs and assigns to understand the agreement existing between said Waters and myself, and to deliver said deed in due form, after the payment of the note named, to Samel B. Waters, his heirs and assigns, to be theirs forever.

(Signed) GEO. A. LATHAM." [Seal.]

"Signed, sealed and delivered in the presence of
W. R. T. BURBANK."

This paper-writing was proved and registered February 19, 1862, and *re-registered* without further proof or order of Court, on May 17, 1886.

It was also alleged, in substance, that the said Latham sold and conveyed the same land by proper deed in fee, dated May 7, 1870, to J. A. Guion; that the latter afterwards sold the same to John A. Arthur, and by like deed, dated August 6, 1872, conveyed title to him; that he died, and his widow and heirs at law by their like deed, dated 25th of June, 1880, conveyed the same land to Susan D. Crabtree; that she afterwards died, and the defendants and her heirs at law, and surviving husband. The deeds last mentioned were each duly registered before the time of the plaintiff's alleged payment of the note mentioned, except the one last mentioned, which was afterwards registered.

The defendants deny most of the material allegations of the complaint—that the plaintiff is such mortgagor, or has any right as such—and allege that each of such purchasers of said land, in succession, purchased the same for a just and fair price, and without any notice of the plaintiff's alleged rights, &c., and have, each so succeeding the other, had continuous actual possession of the land, and put on the same valuable improvements, &c.

On the trial, the plaintiff put in evidence all the deeds above mentioned and referred to, including that styled "a defeasance," and he testified in his own behalf as follows:

"Prior to September 9th, 1859, I owned the lot now in possession of the defendants. On that day I conveyed it to George A. Latham. I have not been in possession of it since that day. At the time I conveyed it to Latham, there was a fire-proof brick store and a long row of shingle sheds upon it. This is the same property described in the defeasance. After it (the note mentioned) was executed and delivered to George A. Latham, I never saw it again until 1877; it was then in the hands of Charles Latham, Jr., who is now living. The note has been paid; I paid it to the said Charles Latham, Jr., in the fall of 1877; it was paid by me in a note of $1,400, and checks which I held against George A. Latham, amounting to about $500. George A. Latham died about 1885. I have seen the property since. I have been in the town of Washington attending the trial of this case. It is worth, with the buildings removed, $100 per annum."

It was admitted that the deed from Waters to Latham was recorded in the Register's office of Beaufort County prior to the time when the paper-writing termed a defeasance was first recorded in lost book 31. It was further admitted that the deed from Waters to Latham, and the deeds from Latham to Guion, and from Guion to Arthur, were recorded prior to the time of the alleged payment of the note executed by Waters to Latham for $1,702.59, and that all of the deeds above referred to, and the deed from Rosa H. Arthur and others to Susan D. Crabtree, were recorded prior to the re-recording of the paper writing termed a defeasance in new book 31.

This embraced all the evidence introduced by the plaintiff and favorable to him.

When the evidence was closed, the Court informed plaintiff's counsel that it would instruct the jury that if they believed the evidence in the case, the plaintiff could not recover.

Whereupon, the plaintiff, in deference to the intimation of the Court, submitted to a judgment of nonsuit, and appealed.

The plaintiff assigns the following grounds of error:

"1. That the paper-writing of May 25th, 1861, and the deed from S. B. Waters to George A. Latham, constitute a mortgage.

"2. That the deed of George A. Latham to J. A. Guion conveyed simply the legal estate, coupled with the trust, and that Guion became trustee; that the deeds from Guion to Arthur, and from Arthur's heirs at law to Susan D. Crabtree, had the same effect, and that defendants are trustees.

"That plaintiff, having paid and discharged, according to his own testimony, the note, in 1877, to Charles Latham, Jr., he is not barred by the statute of limitations or presumptions."

Messrs. J. H. Small and *W. B. Rodman, Jr.*, for plaintiff.
Mr. C. F. Warren, for defendants.

MERRIMON, C. J.—after stating the facts: It is very true, as contended by the counsel of the appellant, that a deed conveying the title to land absolute upon its face may be and is treated in equity as a mortgage of the land to secure a particular debt, but this can be only when the parties to it certainly so intended and agreed by mere words, or some writing, to be evidence of such intention and purpose. Such purpose and agreement must appear by strong and satisfactory proof. Otherwise, the deed—a very solemn instrument—must be accepted as expressing the settled intention of the parties to it. It is made, ordinarily, as, and intended to be, the strongest evidence of that purpose, and will be so accepted and treated until, in a Court of Equity, it shall certainly appear that some condition or modification in connection with and part of it has been omitted from it. *Skinner* v. *Cox*, 4 Dev., 59; *Mason* v. *Hearne*, Busb. Eq., 88; *Robinson* v. *Willoughby*, 65 N. C., 520; Coot on Mort., 24, 25; 1 Jones on Mort., 241, *et seq.* But such a deed, duly proven and registered as required by the statutes of this State on the subject of registration, will not prevail as such a mortgage against subsequent *bona fide* purchasers of the land for value, without notice of such mortgage so contemplated by it and the parties to it, because such subsequent purchasers had no notice of it. As to them, it would be secret, fraudulent and void. Hence, a Court of Equity would not enforce it. *Gregory* v. *Perkins*, 4 Dev , 50.

The agreement whereby such a deed, apparently absolute, is to be subject to a condition or modification, or such a mortgage, must exist at the time the deed is executed. When such instruments are perfected, they, by virtue of their very nature, imply and possess certainty—fixedness as to their provisions and stability of purpose—that can be changed only by an instrument of like character and equal dignity. Neither Courts of law nor Courts of Equity can make or modify valid contracts; they can only determine what they are and give them effect. Courts of Equity can only give effect to and administer rights created by and growing out of them that Courts of law cannot, by reason of their peculiar organization and rigorous methods of procedure. Nor has a Court of Equity authority to change the settled nature of an instrument and make it different from and serve a purpose different from that contemplated by the parties when they made it. 1 Jones on Mort., §§ 244–246.

As we have said, a deed apparently absolute may, by agreement of the parties to it, made at the time of its execution and as part of its basis, be made subject to a condition—made a mortgage—and such agreement may be by mere words, or be reduced to writing, or a separate deed of defeasance may be executed. Such writings may afterwards be executed, but only in pursuance of the agreement made at the time the deed was executed, and, in that case, they will relate back to that time. The writing, whether deed or not, becomes evidence of the nature and purpose of the deed absolute upon its face.

In the present case, the plaintiff appropriately alleges in his complaint, and with sufficient particularity, that the paper-writing called a "defeasance," executed on the 25th of May, 1861, was executed in pursuance of the agreement made at the time the deed, apparently absolute, was executed to Geo. A. Latham, on the 9th of September, 1859, and as part of the ground of it. If this were so, then the latter deed would be taken and treated in connection with the deed of defeasance and as part of it, and the whole as a mortgage of the land to secure the balance of the mortgage debt—that for which the note mentioned was taken. But no evidence was produced on the trial to prove such agreement made at the time the deed of the 9th of September, 1859, was executed, or at all, nor that the debt for which the note was taken was balance of the mortgage debt. The paper-writing of the 25th of May, 1861, makes not the slightest reference to such agreement, nor does it specify or recite at all that the note therein mentioned is the balance of a mortgage debt. Indeed, the plaintiffs failed to produce evidence on the trial to prove a material allegation of the complaint. The paper-writing of the 25th of May, 1861, cannot, of itself, be treated as a mortgage then made. In that view, the debt specified therein was due from the plaintiff to George A. Latham, and the land belonged to him. The debtor cannot give the creditor a mortgage of the latter's own land to secure the former's debt due to him. That would be absurd and nugatory. Treating the land in controversy as the property of Geo. A. Latham at the time the instrument just mentioned was executed, and the latter as an independent agreement, it is, in effect, a covenant on his part to convey the title to the land tó the plaintiff when and as soon as he should pay the note therein specified. The plaintiff, however, did not allege such a cause of action.

It might, perhaps, be contended that the facts stated in the complaint developed sufficiently such a cause of action, and, therefore, the Court should have given the plaintiff such judgment as he was entitled to have. If this be granted, we nevertheless are of opinion that, accepting the evidence as produced on the trial as true, the plaintiff was not entitled to any judgment, because such cause of action as appears, as to the defendants, is fraudulent, and cannot be enforced against them.

The covenant last mentioned was proven and registered February 19th, 1862. The registry was afterwards, in 1864, destroyed by fire, and thus the registration of this covenant ceased to give notice, certainly *in fact*, of it to the public as contemplated by law. The Legislature, intending to remedy such and like mistakes and misfortunes, afterwards provided by statute (Acts 1866, ch. 41, §§ 3, 14; *The Code*, ch. 8, §§ 56, 68), that "all original papers once admitted to record or registry, whereof the registry or record is destroyed, may, on motion, be again recorded or registered, on such proof as the Court shall require. * * * The records and registries allowed by the Court, in pursuance of this chapter, shall have the same force and effect as original records and registries."

This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested. Nevertheless, the plaintiff did not register anew the covenant in question until the 7th of May, 1886, the day this action began, and then it was registered, so far as appears, without submitting it to any tribunal authorized to take proof of and direct it to be registered, as allowed by the statute. The plaintiff was thus negligent of his duty to himself, remiss and misleading as to the public, and, particularly, for the present purpose, as to the defendants. The evidence went to prove that the defendants, and those under whom they claim, after George A. Latham paid full value for the land, that their *mesne* conveyances were proven and registered; that they had possession of the land from May, 1870, putting valuable improvements thereon at intervals, and exercised acts of ownership over the same. The registration of the *mesne* conveyances was notice to the plaintiff of them and their character and purpose. He ought to have taken notice of such possession of the land so claimed by him, and the presumption is he did. Although he failed to re-register the covenant, as stated above, and notwithstanding the striking facts and circumstances recited, he failed, so far as appears, for more than fifteen years to lay claim to the land, or to give any notice to the defendants, or those under whom they claimed, of his claim as purchaser. He paid the note mentioned in 1877, and after that—for more than eight years—he failed to give such notice.

If the registration of 1862 of the covenant in question could, under the circumstances of this case, be treated as constructive notice for any purpose, the plaintiff's gross negligence, his long and misleading silence and failure to give actual notice of his claim, when in fairness and good faith he should have done so, makes it, as against the defendants, unconscionable and fraudulent, and the Court will not enforce it against them.

In any view of the case, as it appears, we think the plaintiff was not entitled to recover.

Affirmed.

J. T. GRIFFITH et al. v. R. W. WINBORNE, Trustee.

Assignment—Agent—Banker—Deed—Delivery—Contract—Costs.

Where W. & Co., bankers, held certain funds as agent for the payment of land, and also held a deed to the land, which was to be delivered when certain corrections were made, and, pending correspondence on this subject, W. & Co. mixed the fund with the assets of the bank, and thereafter made a general assignment of all their effects for the benefit of creditors: *Held*—

1. There had been no delivery of the deed, and the maker of the deed could not recover from the assignee the fund deposited to pay the purchase-money upon delivery.
2. The action being one at law to recover a specific sum, and not involving any equitable element, the plaintiff, failing to establish his demand, was liable for costs.

This was a CIVIL ACTION, heard upon a case agreed, by *Brown, J.*, at the February Term, 1890, of HERTFORD Superior Court.

The *feme* plaintiff, Charlotte Griffith, on the 1st day of January, 1880, was the owner of an undivided interest in a tract of land in the State of Missouri, which she and her husband agreed to sell and convey to one Peter Barnard, for and in consideration of the sum of $271.

The plaintiffs lived in Hertford County, North Carolina, and Barnard lived in the State of Missouri.

On the 7th day of March, 1889, Barnard, at the request of plaintiff, forwarded to Wade & Co., bankers, in Murfreesboro, N. C., the sum of $271, together with a form of a deed to be executed by plaintiffs, and upon the execution and acknowledgment thereof the plaintiffs Ward & Co. were instructed to deliver said $271 to the *feme* plaintiff, and to receive said deed and return the same to Barnard.

Plaintiffs signed and acknowledged the deed as written, but declined to deliver the same to Ward & Co. for Barnard, or to receive the money therefor until they could correspond with Barnard and obtain his consent to make some change in the phraseology of the deed. The plaintiffs instructed Ward & Co. to hold both the deed and money in the meantime until such correspondence was terminated. Pending this correspondence in reference to the change in the deed, Ward & Co. became insolvent, and made a general assignment of all their moneys, choses in action, and other effects to the defendant, as trustee, for the benefit of creditors.

Thereafter, on the 20th day of May, 1889, Barnard consented to the change in the deed requested by plaintiffs, and wrote to Ward & Co. (which letter was received by defendant) to receive the deed with the change made therein as desired by plaintiffs, and deliver the money to the *feme* plaintiff.

The deed is still in the possession of the defendant, and has not been altered as requested by the plaintiff and directed by Barnard, and has not been delivered to Barnard.

Ward & Co. after receiving said $271, without the knowledge and consent of plaintiffs, or of said Barnard, mixed the same with the general funds of their bank, and made no entry on their books crediting the amount to plaintiffs or Barnard, and gave them no evidence of their possession of the same, except a letter to Barnard acknowledging the receipt of the money and deed for the purpose mentioned, and their admission to the plaintiff J. T. Griffith that they had received the money and deed as aforesaid.

On said 10th day of May, 1889, the defendant, as trustee aforesaid, found and received in the bank of Wade & Co., in Murfreesboro, N. C., over $2,000 in currency and coin.

The assets of said bank are insufficient to pay in full the depositors and other creditors of Ward & Co. who are secured in said assignment.

If, upon the above facts, the Court should be of the opinion that the plaintiffs are entitled to recover of the defendant the sum of $271, to be paid by him out of the moneys received as aforesaid, then judgment is to be entered accordingly; and if the Court should be of the opinion that the plaintiffs are not entitled to recover the above, nor any other sum, from the defendant, then judgment is to be entered in favor of the defendant for costs, or such other judgment may be entered in reference to the return of the deed to the *feme* plaintiff and the payment of the money to said Barnard, as the Court may deem just and proper upon all the facts above set forth.

The Court was of opinion, and considered, that the deed referred to therein had never been delivered to Peter Barnard, and that the purchase-money had never been paid *feme* plaintiff, and that she is now entitled to the return of said deed by the defendant, who found and received it among the effects of Ward & Co.

The Court further considered that the plaintiff is not entitled to recover the entire $271 of the defendant, but that Peter Barnard was entitled to recover the dividend thereon, ratably with the other creditors of Ward & Co. who are not preferred by said trust. The defendant was directed to pay the costs of this proceeding out of the trust funds in his hands.

From which the plaintiffs appealed.

Mr. R. B. Winborne (by brief), for plaintiffs.

No counsel *contra.*

CLARK, J.: Upon the facts agreed, it appears that plaintiffs' deed was never executed by a delivery to Ward & Co. as agents for Barnard, but that they held it as agents for plaintiffs until certain negotiations with Barnard should be concluded. Nor did Ward & Co. at any time hold the fund ($271) as agents for plaintiffs. On the contrary, the execution of the deed by plaintiffs (which would include a delivery to Ward & Co. as agents of Barnard) was a condition precedent to the payment of the money to the plaintiffs. Till that was done, the money in Ward & Co's hands remained the property of Barnard. He had the right to recall it, and, if lost, it was his loss and not the plaintiffs'. While matters were in this state, the assignment of Ward & Co. was made to defendant as trustee. After the assignment, Barnard assented to changes in the deed, but plaintiffs have not made them and the deed has not been delivered to Barnard.

The judgment of the Court, that under these circumstances the plaintiffs have no claim upon the fund in the hands of the defendant, the assignee of Ward & Co., was correct. As Barnard is not a party to this action, so much of the judgment as adjudicates upon his right or interest in the fund is erroneous.

This is not an action by the trustee against claimants to the fund asking a construction of the rights of the several parties thereto which would justify the costs of the proceding being taxed against the fund. It is a simple action at law by plaintiffs for recovery of a sum of money when the condition precedent, which would entitle them to it—the execution and delivery of the deed—has not been complied with. Had the action, in this state of facts, been brought against Ward & Co., the plaintiffs could not have recovered either money or costs. Their condition is made no better by the fact that Ward & Co. are represented by an assignee.

The judgment below should have been entered simply against plaintiffs for costs, and without any adjudication upon the rights of Barnard in the fund. Let it be so modified.

Modified and affirmed.

R. W. APPLEGARTH v. J. R. TILLERY.

Negotiable Note—Endorsement—Presumption of Ownership—Fraud—Sufficient Evidence.

1. Where the plaintiff, endorsee of a negotiable note, produces the same at trial in a suit for the consideration, its execution being admitted, the law presumes the plaintiff is the owner and that it was assigned to him before maturity, no evidence being offered to rebut this presumption.
2. Where the only evidence affecting the *bona fides* of the *endorsement* was that, at the time of the *execution*, there were some facts that might have indicated fraud on the part of the *payee: Held*, that the plaintiff (endorsee) was entitled to the instruction that there was no sufficient evidence to go to the jury that the plaintiff was not the owner of the note, and that a failure on the part of the Court below to give this instruction, when asked, entitled the plaintiff to a new trial.

This was a CIVIL ACTION, tried at the February Term, 1890, of HALIFAX Superior Court, before *Boykin, J.*

The following is a copy of the case stated on appeal:

The plaintiff alleged that defendant executed the note sued on, and that the same was transferred to him for value and before maturity.

The defendant admitted the note, but says that its execution was obtained by fraudulent representations of the payees, in that the payees, in consideration of the note, promised to give defendant the formula for making lubricating oil, and refused so to do; and defendant averred that they never had any such formula, and that their promise and assignment to plaintiff were made with the intent to defraud the defendant, and denies that the assignment was made before maturity or for value.

The Justice of the Peace gave judgment for plaintiff, and the defendant appealed to the Superior Court.

The note is, in words and figures, as follows:

"$100. TILLERY, N. C., January 20, 1888.

"Ninety days after date, I promise to pay to the order of Messrs. H. Fink & Sons one hundred dollars, value received, at the office of Eure, Farrar & Co., Norfolk, Va.

J. R. TILLERY."

The following issue was submitted by his Honor to the jury:

Is the plaintiff the owner of the note described in the complaint?

The jury responded, No.

The plaintiff produced the note at the trial, and offered his own deposition in evidence, which was regularly taken in the city of Baltimore, and was as follows:

"I am the holder of the note of J. R. Tillery, drawn by him to Henry Fink & Sons' order, dated about the 19th or

20th of January, A. D. 1888, for the sum of one hundred dollars, and payable three months after date, which was on the 19th to 22d day of April, A. D. 1888, and by the said Henry Fink & Sons endorsed in blank to Catherine Fink, and by her endorsed to me. The note was made payable at the office of some one in Norfolk. I sent the note after it became due and was protested, as I believed, to my attorneys, Messrs. Whitaker & Whitaker, at Halifax, N. C., for collection. I purchased the note from Mrs. Catherine Fink on the 24th day of January, A. D. 1888, on which date I gave her my check for fifty-five dollars, which was paid on presentation, and a receipt for forty-five dollars which she then owed me. I did not have any notice or knowledge of any equities as between Tillery, the maker, and Fink & Sons, the payees, of the note, or anybody else connected with it, but, on the contrary, I was told by Mrs. Fink that the note was given for value, and that Tillery was a man of means, and that the note would certainly be paid at maturity. I looked up the maker's standing, and being satisfied that he was a man whose credit was good, I purchased the note *bona fide*, and for value."

The defendant was then offered in his own behalf, and he testified as follows:

"One Fink, one of the payees in the note, came to my place of business and offered that, if I would give him my note at 90 days for $100, he would furnish me a formula for making lubricating oil, which would enable me to get oil of first-class quality for one-half of its usual price. I executed the note and handed it to him. He put it in his pocket, and then told me not to tell the formula, and said mix a white substance with ordinary oil in proportions of one-half each, sprang into his buggy and drove off. That formula was the only consideration for that note. I have not paid the note."

The defendant then offered in evidence the endorsements on the note, which are: "H. Fink & Sons," "Catherine Fink"; and the execution of the note was admitted.

The plaintiff asked his Honor to charge the jury—

1. That the plaintiff having produced the note at the trial, and its execution being admitted, and being negotiable, the law presumes that the plaintiff is the owner of the note, and that it was assigned to him before maturity, and that there was no evidence to rebut the presumption.

2. That there was no sufficient evidence to go to the jury that the plaintiff was not the owner of the note.

His Honor gave the first part of the first instruction requested, but declined to charge that there was no evidence to rebut the presumption.

He refused to give the second instruction, but charged the jury that, if they believed the evidence, the plaintiff was entitled to recover.

The plaintiff excepted for refusal to charge as above requested, and appealed from the judgment rendered upon the verdict.

Messrs. F. W. Whitaker and *R. O. Burton*, for plaintiff.

No counsel *contra*.

MERRIMON, C. J.—after stating the facts: The note sued upon was negotiable, and the title to it passed to the holder thereof by endorsement. The execution of it, and the endorsement thereof, were not questioned. The presumption was that it and the endorsement were founded upon a valuable consideration. The possession, and production of it in evidence on the trial, implied that the plaintiff acquired it in the course of business, in good faith, and for full value, before it became due, and without notice of any fact impeaching its validity in his hands. The plaintiff certainly produced evidence to prove his case *prima facie*. The burden was, then, on the defendant. *Meadows* v. *Cozart*, 76 N. C., 450, and the authorities there cited.

We cannot hesitate to hold that the defendant produced no evidence, nor was there evidence, to prove that the plaintiff was not the owner of the note, and we cannot see why the Court did not give the instruction as requested by the plaintiff. He was clearly entitled to it. The mere fact that the payee of the note may have perpetrated gross fraud upon the defendant in obtaining the note from him cannot affect the course of justice.

The plaintiff is entitled to a new trial, and we so adjudge.

Error.

JAMES T. GOOCH, Adm'r, v. W. W. PEEBLES et al.

Attorney and Client—Conflict—Will—Trustee.

1. An attorney cannot terminate his relation with his client, at pleasure and without notice, so long as anything remains to be done about the matter in which he is employed.
2. So, where P. was the attorney of an executrix, and trustee under a will (she having also an interest in the property devised), who was afterwards removed and another administrator *d. b. n. c. t. a.*, having adverse interest, was appointed in his place, and P. became his attorney in the settlement of the estate: *Held*, that P.'s relations were so conflicting and antagonistic that the law would not sanction his action, and this, though no compensation was actually paid him.
3. And where, in proceedings by such administrator to sell certain lands of his testator for assets, the attorney P., who, having purchased an interest of the testator's husband in the lands, was co-defendant with his client, the executrix, obtained a decree of Court without her knowledge, whereby he became entitled to the surplus proceeds of such sale: *Held*, he could acquire thereby no interest adverse to hers, and the decree should be vacated so far as it affected or declared his interest.

4. The conflict of his *duty* as attorney for the administrator, charged with protecting the interests of the executrix and her *cestui que trustant* under the will, with his interest, as one of the defendants, asserting a claim against the estate, cannot be permitted in a Court of justice.
5. Discussion by DAVIS, J., of the duties and responsibilities of attorneys in their relations to their clients.

This was a CIVIL ACTION, tried at the Spring Term, 1889, of NORTHAMPTON Superior Court, before *MacRae, J.*

The complaint alleges in substance—

1. That in 1873 Virginia A. Johnson died in Northampton County leaving a last will and testament, which was duly proved on the 3d day of March, 1873, and that Chatharine T. Johnson, the executrix therein named, qualified as such.

2. That on the first day of April, 1876, said executrix was, by a decree of Court, removed, and J. J. Long, the intestate of the plaintiff Gooch, was appointed administrator *d. b. n. c. t. a.*

3. That in September, 1876, said Long, administrator, &c., instituted a proceeding to sell the real estate belonging to the testatrix, known as "Diamond Grove," to make assets to pay debts. In said proceeding, Catherine T. Johnson, Mary L. Johnson, C. W. Johnson, P. M. Johnson, Jennie V. Johnson, James Johnson, Mrs. M. B. Cook, C. A. Johnson, S. B. McMillan, W. W. Peebles and R. B. Peebles were defendants.

4. That, by decree made in said special proceeding, said land was sold, and thereafter the sale was confirmed, and a distribution of the proceeds directed. (A copy of the special proceedings is filed as a part of the complaint.)

"5. That W. W. Peebles, one of the defendants in the action was a defendant in said special proceeding, at the same time acting as attorney for the plaintiff J. J. Long; was surety on the prosecution of said Long as administrator, and, as such attorney, he drew the petition for sale of said land, the decree directing the sale thereof, the order directing the distribution of the funds, the order confirming the sale, and order of publication; he acted throughout said proceeding as attorney for plaintiffs and attorney for defendants.

"6. That C. T. Johnson, the executrix above named, one of the plaintiffs in this action, and one of the defendants in the special proceeding above mentioned, employed said W. W. Peebles as her attorney, while she acted as such executrix; and reposing the utmost confidence in his integrity and disposition to deal fairly by her and the other distributees and legatees under the will of the said Virginia A. Johnson, employed and relied upon said W. W. Peebles to manage and protect the interest of herself and the other legatees and distributees under the will of the said Virginia A. Johnson during the administration of said J. J. Long; that she and the other legatees and distributees under said will filed no answer in said special proceeding, because never informed by said W. W. Peebles it was necessary so to do to protect their interests; that she never saw said petition, and believed, till within a short time prior to the beginning of this action, that the scope of said petition only extended to the sale of said land merely to make assets to pay the debts of Virginia A. Johnson; that she did not employ said W. W. Peebles as her attorney in person, but her brother, the late James Johnson, the husband of the said Virginia Johnson, who attended to all matters of business for her, retained the said W. W. Peebles for her, to attend to all their interests in said estate.

"7. That since the beginning of this action, she, and the other legatees and distributees under said will, heard for the first time of the claim of the defendants W. W. Peebles and R. B. Peebles to the surplus from the sale of said land remaining after the payment of the debts of Virginia A.

Johnson; that had the legatees and distributees under said will been apprised of any such claim, they would have resisted the same; they are informed that said claim is based upon a sale under executions issuing on judgments in favor of sundry parties against one James Johnson, husband of the said Virginia A. Johnson.

"8. These plaintiffs are informed and believe, and so charge, that the said James Johnson took nothing under the will of the said Virginia A., and that the sale under which the plaintiffs claim was null and void.

"That J. T. Long died in the county of Halifax, North Carolina, on the ---- day of April, 1877, and that the plaintiff James T. Gooch was soon thereafter appointed administrator *de bonis non* with the will annexed of Virginia A. Johnson, was qualified and entered upon the discharge of his duties as such, and is still administrator; that on the 14th day of December, 1877, the said James T. Gooch was appointed administrator *de bonis non* of J. J. Long; was qualified as such, entered upon the discharge of his duties, and is now such administrator; that both of said appointments were made by the proper Court, and according to law.

"10. These plaintiffs are informed, believe, and so charge, that the said decree directing the payment of the surplus of the proceeds arising from the sale of said land to the defendants W. W. Peebles and R. B. Peebles was without warrant of law, is null and void, and is a fraud upon the rights of the plaintiffs.

"Wherefore, the plaintiffs demand judgment, that so much of said decree as directs the payment of the surplus of the proceeds of said land, after the payment of the debts of Virginia A. Johnson, to the defendants W. W. Peebles and R. B. Peebles, be amended, cancelled and declared void."

The answer of W. W. Peebles, so far as material to be considered, denies so much of the fifth allegation of the complaint as alleges that "he acted throughout said proceeding as attorney for defendants." That in the special proceeding for the sale of the land he acted as attorney for the petitioner therein. He denies that he acted as "attorney for the defendants, or either of them, or that he ever promised to act as such, or that he was ever employed or sought to be employed as such."

In answer to the sixth section of the complaint, he admits that he acted as attorney for C. T. Johnson, as executrix of V. A. Johnson, from the time of her qualification as executrix till her letters testamentary were cancelled and she was removed as executrix * * * and during all of that time he served her faithfully, to the best of his ability, but he denies that he was employed as attorney or acted as attorney for her, or either of the defendants, in said special proceeding, after she was removed as executrix, * * * and after and during the administration of said J. J. Long. According to his best recollection and belief, Dr. James Johnson, the brother of the testatrix, employed him to act as attorney for said testatrix, as herein stated.

The seventh, eighth and tenth allegations are also denied.

He also says that the Court has no jurisdiction of the subject-matter of the action, and "that this action was not commenced within the time limited by law, because it was not commenced within three years from the time the cause of action accrued." R. B. Peebles adopted the answer of his co-defendant, W. W. Peebles.

By the will of Virginia A. Johnson the whole of her estate is devised and bequeathed to Catherine E. Johnson, her sister-in-law, " in trust to hold and preserve the same from all liability to the debts of my husband, James Johnson, which were contracted by him prior to our intermarriage.

"Secondly. To hold the same, subject to the foregoing provisions, for the use and benefit of my husband, the said James Johnson, during the term of his natural life, and at his death to dispose of and convey the same in such manner and to such persons and purposes as the said James Johnson may, by his last will and testament, direct.

"Thirdly. In case any person or persons should take proceedings to subject any portion of my estate, held in trust as aforesaid, to the debts of the said James Johnson, which were contracted prior to my marriage with him, then, and in that case, all interest, whether as *cestui que trust*, or otherwise, of the said James Johnson in my said estate shall instantly cease and determine, and the said Catherine Johnson shall thereafter hold the same, divested and discharged of the aforesaid trust, and upon the following trusts, namely: In trust for her own use, and further use of such of the daughters of my said husband, James Johnson, as may then never have been married, as long as they remain single; as each may marry her interest shall cease, and when all are married, then in trust for her own use and the use of the married daughters of the said James Johnson, share and share alike; on the death of the said Catherine Johnson her interest shall cease, and shall go over into the common fund for the benefit of the other *cestui que trust*.

"Fourthly. Subject to the foregoing provision, I declare that Catherine Johnson shall have power to sell any portion of my real estate and make title to the purchaser, on receipt of the purchase-money, and the like as to my personal estate, and shall re-invest the proceeds, to be held upon the same trusts as the original estate.

"Fifthly. In case my husband, James Johnson, shall die without having executed any last will and testament, I declare that my said estate shall be held by Catherine Johnson upon the trust declared in the third clause of this my will.

"Sixthly. In case the said James Johnson shall fully pay, or discharge by any means, all and every part of the debts contracted by him prior to my marriage with him, then, and in that case, I declare that he shall take and receive all my aforesaid estate, free and discharged from all the trusts in the premises declared, and shall hold the same absolutely for his own sole use and benefit."

Catherine T. Johnson is named sole executrix and qualified as such, and employed the defendant W. W. Peebles, who was then a practicing attorney in Northampton County, as her counsel.

From the special proceeding, referred to in the complaint, a copy of which is sent up with the record, it appears that the defendants therein, other than W. W. Peebles and R. B. Peebles, were non-residents, and in the notice to make them parties by publication it is stated that the "object of the action is for the sale of certain real estate (describing it) for the payment of the debts of the deceased, V. A. Johnson, and that no personal claim is made against them. This notice is signed, "W. W. Peebles, Plaintiff's Attorney."

The sale under that proceeding was made December 4th, 1876, and reported the same day, and on the 24th of December, 1876, there was an order that "the defendants take notice that unless objection is made within ten days from the service of this notice," the report of sale, &c., will be confirmed. There is an endorsement as follows: "Service accepted December 24th, 1876. W. W. Peebles, R. B. Peebles." This notice does not appear to have been served upon the other defendants (plaintiffs in this action) by publication or otherwise.

There is an order (without date) confirming the sale, and directing J. J. Long, administrator, &c., to pay therefrom the debts and charges of administration, "and that the surplus, if any, he shall pay to the defendants W. W. Peebles and R. B. Peebles."

James Johnson died in 1876, without having made any will, and the plaintiffs Camilla and Lula were his only unmarried daughters at the time of his death.

The property of Mrs. Johnson consisted mainly of the plantation on which she resided at the time of her death, known as the "Diamond Grove."

Previous to the death of the said James Johnson, executions issued against him and were levied upon his interests in the said "Diamond Grove" plantation, and a few days after his death a sale was had under said executions, at the court-house door in Jackson, on the 6th of April, 1876, when and where the defendants W. W. Peebles and R. B. Peebles became the purchasers, in the sum of ten or fifteen dollars.

A proceeding had been instituted before the Clerk of Northampton Superior Court to remove the said Catherine Johnson as executrix, and on the 23d day of March, 1876, she was removed by the Clerk, and J. J. Long, the plaintiff Gooch's intestate, qualified in her stead as administrator *de bonis non cum testamento annexo* of Virginia A. Johnson, on April 1, 1876. Said proceeding before the Clerk was at the instance of the said J. J. Long, who was a creditor of Virginia Johnson, whose attorney in the matter was the defendant R. B. Peebles, and the said Catherine was represented by her counsel, the defendant W. W. Peebles.

On September 12th, 1876, a special proceeding was instituted before the Clerk to sell "Diamond Grove" to make assets to pay the debts of Virginia Johnson. In said proceeding, the said J. J. Long, as administrator *de bonis non cum testamento annexo* of Virginia Johnson, is plaintiff, and Catherine T. Johnson, Camilla Johnson, Lula Johnson (called May L.), the above plaintiffs; C. W. Johnson, P. M. Johnson, Jennie V. Davidson, Mrs N. B. Cook, Susan B. McMillan, and the said W. W. Peebles and R. B. Peebles are defendants. The said W. W. Peebles appears as attorney for the plaintiff Long, and all the papers drawn in said proceeding are in his hand-writing. The Clerk ordered the sale of the land, appointing the plaintiff J. J. Long a commissioner to sell the same; sale was made and confirmed, and in the final decree it is adjudged that all the surplus arising from the sale, after paying the debts of Virginia Johnson, should belong to the defendants W. W. Peebles and R. B. Peebles. The said J. J. Long is dead, and the plaintiff Gooch is his administrator, and also administrator *d. b. n. c. t. a.* of Virginia Johnson.

The purpose of this action is to declare fraudulent, and to set aside so much of said final decree as adjudges that the surplus arising from the sale of "Diamond Grove," after paying the debts of Virginia Johnson, should belong to the defendants W. W. Peebles and R. B. Peebles.

When the case was called for trial, plaintiffs moved for judgment on the pleadings on the ground that the pleadings themselves disclosed a state of facts that renders that part of the said final decree fraudulent and void.

This motion was denied by his Honor, and the plaintiffs excepted.

The following two issues were agreed on to be submitted to the jury:

"1. Is that part of the decree declaring the defendants entitled to the surplus, after paying the debts of Virginia Johnson, fraudulent?"

"2. Is the action barred by the statute of limitations?"

The plaintiffs introduced the following evidence:

1. The record of the special proceeding to sell "Diamond Grove" to make assets, all the papers in which are admitted to be in the hand-writing of W. W. Peebles.

2. The record of a suit now pending in the Superior Court of Northampton County, in which the said J. T. Gooch, as administrator of J. J. Long, is plaintiff, and W. W. Peebles is defendant, to recover the funds in his hands belonging to the estate of his intestate, who was a creditor of Virginia Johnson, arising from the sale of "Diamond Grove." In this action an account was stated, by an order in the cause,

in which the defendant W. W. Peebles admitted a balance in his hands of $2,935.

3. The proceedings and exhibits in the complaint, for the purpose of showing what facts are admitted by the defendants.

4. The deposition of Catherine T. Johnson, who resides in Mecklenburg County, Virginia, in which she testifies, in substance: That she duly qualified as executrix of Virginia Johnson, and was afterwards removed; that, through her brother, James Johnson, she employed Mr. W. W. Peebles as her counsel as executrix and trustee under the will, and relied upon him to protect her interests as such executrix and trustee. In reply to the question whether she employed counsel to defend her interests in the proceeding instituted on the 12th of September, 1876, by J. J. Long, administrator *d. b. n. c. t. a.*, to sell the real estate known as "Diamond Grove" to make assets to pay debts, &c., she says: "Mr. W. W. Peebles had been employed as my counsel as executrix and trustee, and I relied upon him, and him alone, to protect my interests as such executrix and trustee about that and every other matter of the estate."

In answer to the question why she failed to file any answer or make any defence to said proceeding, she says:

"I did not know that it was necessary; I did not hear anything from Mr. Peebles, and I thought he would do whatever was necessary to protect my interests, and that he would keep me informed."

8. In said proceeding a final decree was made, directing the distribution of the surplus arising from the sale of "Diamond Grove," after paying the debts of Virginia Johnson. State when you were first informed of said decree, and the order therein directing the distribution of said surplus? Answer: "I first heard of this only a short time ago—within the last two or three weeks—receiving the information through Mr. T. W. Mason. If I had received any information that Mr. Peebles would claim the surplus, after pay-

ing the debts of Virginia Johnson, instead of its coming to me, as executrix and trustee, I should have resisted it, and asserted my claim to it."

The defendants were not present or represented at the taking of said deposition.

The defendant W. W. Peebles was introduced as a witness, and said:

"I never had any connection with Catherine T. Johnson, except as attorney for her in the probate of the will of Virginia A. Johnson, and as her attorney for the administration of that estate, so long as she remained executrix up to the time of her removal, except probably one other time, when she and Dr. Johnson were warranted, and I defended the suit. According to my recollection, she was warranted as executrix; she never paid me a cent in her life; neither she, nor any one for her, ever consulted me after she was removed as executrix; don't remember to have spoken to her, except on the day she qualified; the business was conducted between me and her brother Dr. James Johnson. I did not dispute Mr. Long's right to sell the land for assets; I did not attempt to represent any of the defendants in that proceeding; only represented Mr. Long as his attorney; never expected anything but my portion of the surplus; at that time did not expect much from that source. No part of the surplus has ever been paid over to R. B. Peebles; don't remember whether the costs have been paid, but think they have been. Miss Catherine Johnson never wrote to me about her business after her removal. R. B. Peebles was attorney for J. J. Long in the special proceeding for the removal of Catherine Johnson, executrix. I resisted that motion for a long time; wrote her that she would be removed if she did not come up and make a showing; she did not come, and made no return. I suppose she is a trustee under the will; I did not conceive that I had any other employment from her, but the probate of the will and the settlement of the administration of the estate; she had no other attorney but me; I can't say that I was Dr. Johnson's general attorney; he acted for his sister. I think Mr. Coningland was his general attorney. My recollection is that he employed me to prove the will and assist his sister in administering the estate while she was executrix; I don't remember whether she was removed before the --------; I bought the interest of Dr. Johnson in the land before she was removed; I did not advise her that I had bought his interest; I did not procure the sale of the land; I did not conceive it was my duty to advise her that I had purchased and claimed the land; I paid a very small sum for it—ten or fifteen dollars. If the sale was made before her removal, then I was her attorney; if made after her removal, then I was not her attorney. When the sale took place under the execution, I don't remember whether she had been removed or not. Mr. J. J. Long claimed about $1,300, and afterwards his administrator, J. T. Gooch, claimed about $500 more. I denied that claim; don't think he ever told me after the sale of the land how much he claimed. I got the commissions for the sale of the land; Mr. Long was appointed commissioner, but I did all the business; I got paid for taking out the letters; I expect one-half of the surplus in my hands to go to me, and one-half to R. B. Peebles. The executions against Dr. Johnson were in the Sheriff's hands before his death, but the sale of the land was made a few days after his death. His interest in the 'Diamond Grove' land was sold by the Sheriff. I did not procure the executions to issue; I only issued those I represented after the others had issued, because I thought they had priority. I had no idea that James Johnson's interest in the land was worth so much. There were divers suits pending against the estate of Virginia A. Johnson, which turned out favorably to the estate. J. T. Gooch, as administrator of Virginia A. Johnson, has a suit against me, claiming money for her estate. The suit was first as administrator of J. J. Long; then he qualified as administrator *de bonis non* of Virginia A. Johnson. This suit was pending a long time before the present action; in it he demanded this surplus. I resisted paying the money over to Gooch's administrator, V. A. Johnson, on the ground that Long, administrator, had got money enough to pay all the debts. I also paid some costs and charges against her. The balance found in my hands was about $2,935, proceeds of sale of 'Diamond Grove.' If these suits against Virginia Johnson had been successful, the sale of the land would not have paid me a cent. Can't remember whether the purchase of the land at Sheriff's sale was before or after removal of Miss Catherine T. Johnson. I had no occasion to advise Miss Catherine T. Johnson in the management of the estate, except to defend suits brought against her; I never informed her that I had ceased to act as her counsel; don't remember that Dr. Johnson ever consulted me in regard to his rights under the will. The suit for Miss Catherine Johnson's removal had pended a long time. I regretted her removal very much, on account of the Johnsons and on my own account. I had never used a cent. Dr. Johnson had come up here frequently and consulted me. I complained to R. B. Peebles that I had never received anything, and it was agreed that I might represent Mr. Long in filing the petition to sell 'Diamond Grove'—might be his attorney. I saw Mr. Long; a day was appointed for him to come; he came, and made the affidavit to the petition. It was agreed that I should act for him, do the work and take the commissions. He turned the whole matter over to me, and I really acted as administrator. I was his attorney, and I was also defendant. I was assignee of Dr. Johnson's interest in the land. If there were no debts, R. B. Peebles and I were entitled to the whole. It was my intention to make the debts of Virginia Johnson's estate as small as possible for the interests of the estate. I don't see that the positions were antagonistic. I discharged my duties faithfully to Mr. Long."

The defendants further introduced the record of a suit now pending in the Superior Court of Northampton County, in which Catherine T. Johnson, Camilla Johnson and Lula Johnson are plaintiffs, and J. T. Gooch, administrator of J. J. Long, is defendant, begun August 25, 1882, for an account and settlement of the estate of Virginia Johnson. Also record showing removal of Catherine Johnson, on 23d March, 1876, and appointment of J. J. Long in her stead, on April 1, 1876. Also deed of Sheriff Newsome to W. W. Peebles and R. B. Peebles, dated April 6, 1876, conveying to them the interests of Dr. Johnson in "Diamond Grove," and reciting that the said trust was sold on the 6th day of April, 1876.

The plaintiffs asked the following instructions.

1. If the jury should believe that Catherine T. Johnson employed W. W. Peebles as her counsel, and relied on him to protect her interests in the management of her interests as executrix and trustee, and that he gave her no information as to the decree made in the special proceeding declaring that the surplus should go to W. W. Peebles and R. B. Peebles, then that would be a fraud, and the jury should answer the first issue, Yes.

His Honor refused to give the instructions prayed for, and plaintiffs excepted.

His Honor charged the jury as follows: (Only so much of the charge as is reviewed in the opinion is set out.)

"It is admitted that the defendant W. W. Peebles was acting as counsel for the petitioner, J. J. Long, administrator of Virginia A. Johnson, in the special proceeding, and that he prepared the petition and the orders, which are in his handwriting. Now it is alleged that he was also the counsel of Miss Catherine T. Johnson, who had been executrix of Virginia Johnson before Mr. Long was made administrator, and had been removed and Mr. Long appointed in her place; that he was her legal adviser, and was relied upon by her as her general counsel at the time the special proceeding was brought and carried on, and that he acted in that proceeding, not in her interest, but against her, and that such action will not be upheld in the law, but will be declared fraudulent and void.

"On the other hand, the defendant W. W. Peebles avows that he was not her attorney or counsel at the time he conducted the special proceeding. He admits that he had been her counsel and advisor while she was executrix of Virginia Johnson, but he testifies that, from the time of her removal, he ceased to be in the relation of attorney to client, and this is the point for you to determine, and what was paid for the land when the interest of Dr. Johnson in the land was sold, whether a fair price or not. But was he still her attorney or counsel? For, if he was, he could not buy in the land for himself. If he ceased to be her legal adviser when she was removed from executrixship of the estate of Virginia Johnson, and no longer occupied that relation to her, he could bid at the sale of the land, and, if he was the highest bidder, was entitled to be declared the purchaser.

"The plaintiffs having alleged fraud in the transaction, must satisfy you of its truth. If they have so satisfied you, answer the first issue, Yes; otherwise, No.

"2. Is the action barred by the statute of limitations?

On this last issue, his Honor said he would take the responsibility to direct the jury to answer No.

Plaintiffs excepted, for the refusal of his Honor to give the instructions prayed for by them, and also for error in the instructions as given.

The jury responded to the first issue, No.

The plaintiffs moved for judgment, *non obstante vere dicto*, on the ground that the non-resident parties were never properly served with summons in the special proceeding.

His Honor denied this motion, for the reason, as stated by him, that that relief could be obtained by motion in the special proceeding, and plaintiffs excepted.

Plaintiffs then entered a rule for a new trial for the errors already alleged. Rule discharged.

Before signing the judgment, the Judge allowed the summons in this action to be so amended as that the plaintiff Gooch might sue, both as administrator *de bonis non* of J. J. Long, and administrator *de bonis non cum testamento annexo* of Virginia A. Johnson.

There was a verdict and judgment for defendants, and plaintiffs appealed.

Messrs. T. W. Mason, W. C. Bowen and *W. H. Day*, for plaintiffs.

Mr. R. B. Peebles, for defendant.

DAVIS, J.—after stating the facts: Several questions are presented in the record, but we think it only necessary to consider that presented by the refusal of his Honor to give the first prayer for instruction asked by the plaintiffs, and the exception to the charge as given in relation thereto, as these will be decisive of the case upon its merits.

Were the plaintiffs entitled to the first prayer for instruction, which was denied, and if so, was it sufficiently included in the charge as given?

An attorney is licensed by the State to practice law, and is thereby invested with certain rights and privileges, which impose upon him correlative duties and obligations. He is an officer of courts in which he may practice, and occupies a *quasi* official relation to the public, and when he assumes the duties of attorney to client, one of these, undoubtedly, is to communicate to his client any fact within his knowledge relative to the business about which he is employed, that it may be important for the client to know; and having once assumed the relation of attorney to client, he cannot terminate it at his pleasure, and without notice to his client, so long as anything remains to be done about the matter in which he is so employed. Weeks on Attorneys at Law, § 249; *Walton* v. *Sugg*, Phil. Law, 98.

It is admitted that Mr. W. W. Peebles was attorney for the plaintiff C. T. Johnson, but he insists that he was only her counsel as executrix "for the administration of the estate as long as she remained executrix, up to the time of her removal," and that he ceased to be such when she was removed. She was not only executrix of the will of V. A. Johnson, about which it was his duty to advise her, but she was also trustee under the will, with important duties to discharge as such—a trust that involved rights of her own as well as duties to others. It appears from the record that she was a non-resident, and, in any event, it was the duty of her attorney to inform her of the fact that she had been removed as executrix, and that she had rights as a devisee, and duties to discharge as trustee under the will which remained, notwithstanding her removal as executrix.

These were matters of great importance to her, about which it is manifest she would need counsel, and if he intended no longer to act as such, it was his duty to so inform her, and he could not terminate his relation to her as attorney without so informing her. Needing counsel and having employed counsel, she could not be thus left ignorant of the fact that she had none.

The duty of counsel did not begin with the proceedings instituted for her removal as executrix.

He had been employed long before, and was, what has been usually termed, general counsel and adviser as to her duties under the will, and her duties as executrix and her rights and duties as trustee were so intimately blended that duties of counsel would have been only half discharged if he failed to advise her as to both, and, in the absence of any notice or information to the contrary, she had a right to regard the relation of attorney and client as continuing, and the attorney could not terminate it without such notice. Scrupulous good faith is required of an attorney towards his client, and even after the relation ceases, the attorney can acquire no rights and assume no obligations in regard to the subject-matter of his advice and counsel antagonistic to the rights and interests of the client, unless the most ample information has been afforded to place the client on her guard. Weeks on Attorney, § 271, *et seq.; Ziegler* v. *Hughes*, 55 Ill., 288.

But it is said that no fees were paid. This cannot alter the case. It does not appear that they were demanded or required to be paid in advance, and she was not notified that payment of fees was necessary as a requisite to the continuance of counsel. Besides, it was not unnatural that she should have supposed that they would be paid in the settlement of the estate, when funds might be in hand to enable her to do so. However this may be, the attorney is not justified in terminating his relation to his client for this reason without notice. Weeks on Attorney, § 316.

Mr. Peebles says: "I suppose she (C. T. Johnson) is a trustee under the will; I did not consider that I had any other employment from her but the probate of the will and the settlement of the administration of the estate; she had no other attorney but me," &c. And again, in regard to the proceeding for the sale of land, &c., he says: "I saw Mr. Long; a day was appointed for him to come; he came and made the affidavit to the petition. It was agreed that I should act for him, do the work and take the commissions. He turned the whole matter over to me, and I really acted as administrator. I was his attorney, and I was also defendant." These were relations that placed his duty and his interest in conflict, and the law will not permit it.

It was not necessary that there should have been any actual fraud in the transaction, but the rule which forbids it, rests upon the broad principle of public policy which precludes persons occupying these fiduciary relations, from representing conflicting interests that may tempt them to disregard duty and lead to injury on one side or the other.

The law will not permit an attorney to represent conflicting interests at the same time, nor will it, after he has represented one side, permit him to become the attorney of the adverse side in regard to the matter in controversy to the detriment of his original client. *Molyneux* v. *Huey*, 81 N. C., 113.

"The relation of attorney and client is usually terminated by the termination of the particular proceeding or business for which he was employed. * * * His authority to act cannot be ended by his own voluntary act to his client's detriment." Weeks on Attorneys at Law, § 249. Again, it is said by the same author, § 258: "An attorney employed, or consulted as such, to draw a deed, or an application for an original title to land, is precluded from buying for his own use any outstanding title. In such case the relation is confidential, and whether he acts upon information derived from his client, or from any other source, he is affected with a trust. The rule is on the ground of public policy, not of fraud, and prevails, although the attorney be innocent of any intention to deceive and acts in good faith."

Mr. Peebles says: "I bought the interest of Dr. Johnson in the land before she was removed. I did not advise her that I had bought his interest. * * * I did not conceive it was my duty to advise her that I had purchased and claimed the land" He afterwards says: "I don't remember (when the purchase under the execution was made) whether she had been removed or not."

It appears from the order of removal, dated March 23d, 1876, and the date of sale, April 6th, 1876, as a matter of fact, that she was removed before the purchase; but it is distinctly stated that she was not informed of it, either before or after, and having acted as her attorney, he could acquire no interest in the matter antagonistic to hers, without notice to her, and the fullest and fairest explanation. *Henry* v. *Raiman*, 25 Penn., 359.

There is another view of the case which we think adverse to the defendants. Even if it were conceded (and we do not think it can be) that the attorney could put an end to his relation, as such, to his client without notice, it was his duty, whether as attorney of J. J. Long, administrator *d. b. n. c. t. a.*, or whether he "really acted as administrator" to protect, as far as he could, the rights and interests of C. T. Johnson, and the others for whom she was trustee, against unjust or improper claims against the estate, it was his interest, as one of the defendants in the special proceeding (in which he acted as counsel for the plaintiff administrator *d. b. n. c. t. a.* and drew all the papers), to assert a claim which it was the duty of the administrator, in behalf of his co-defendants, the devisees under the will, to resist. This conflicting duty cannot be permitted in courts of justice. If it be said that the law allows a creditor to administer on the estate of the debtor, and his interest is antagonistic to that of the estate and of the next of kin, the answer is that this is by statute, and proceeds from necessity, to enable the creditor to collect his debt, because no one primarily interested in protecting the estate will administer. In this case, he does not stand in the relation of a creditor administrator, who, being known as such, is known to be acting in his own interest, as well as for others, and the next of kin, but as counsel for the plaintiff in the special proceeding. In this capacity, it was his duty, primarily, to protect the interests of the estate, and especially the rights and interests of the devisees. In his capacity as a claimant of the interest of James Johnson, he causes himself to be made a party defendant in the special proceeding with the devisees of V. A. Johnson, and this for the purpose of enabling him to assert a claim, not as a creditor of V. A. Johnson, for whose debts the land was sought to be sold, but adverse to his co-defendants, whose interest it was the duty of the plaintiff administrator to protect and defend, and this without any notice of such a claim, by publication or otherwise, to the plaintiffs in this action (defendants in that), of the existence of such a claim, for, while there is a question as to the sufficiency of the notice by publication, which, in the view taken by the Court, is not necessary to consider, the petition was to sell land to pay the debts of V. A. Johnson, deceased, and the notice stated only this to be the object of the petition, and that there was no personal claim against defendants, and while there was notice that the sale would be confirmed, service was accepted by the defendant only, and there was no service in any way upon the other defendants, the present plaintiffs, and the sale was confirmed and the order for payment and distribution made without notice to any one of record, except the present defendants, who accepted service, and whose interest was adverse to their co-defendants.

It will be seen from the will of V. A. Johnson that the whole of her estate was devised to C. T. Johnson as trustee, for the purposes named. It was so stated in the petition for sale drawn by the defendant W. W. Peebles, and it is not pretended that she had any notice, by publication or otherwise, of this claim by the defendants to the surplus.

It has been held in Mississippi that an attorney, employed to collect a claim against the estate of a deceased man, could not assume the administration of the estate, because, as attorney, he was bound to protect the interest of his client, and, as administrator, he was bound to protect the interest of the estate. "Under such circumstances," says the Court, "the attorney could not have performed his duty to prosecute the claim, if its validity had been doubtful, consistently with his duty to defend the estate against its collection. Hence a strong temptation would necessarily arise to violate his duty in the latter capacity, and to pay the claim," &c. *Sprink* v. *Davis*, 32 Miss., 152. The law will not permit its licensed attorneys to assume relations that will subject them to this temptation upon grounds of public policy, and it is for this reason that an attorney will not be permitted to represent both sides in any litigated matter. This is too well settled to need citation or authority.

The plaintiffs were entitled to the first instruction asked by them, and it was not covered by the charge as given. There was error in refusing the first prayer for instruction, and also in the second paragraph of the charge as given.

The jury should have been told that, if they believed the evidence, Mr. Peebles could not terminate his relation as attorney for C. T. Johnson without notifying her of what had been done.

Error.

CORNELIA A. R. JACKSON v. DANIEL JACKSON.

Divorce—Pleading—Evidence—Allegata and Probata.

1. When, in an action for divorce *a mensa et thoro*, there was no evidence of turning *feme* plaintiff out of doors at any time more than six months before the bringing of the action: *Held*, that the issue, "Did the defendant maliciously turn plaintiff out of doors?" was properly excluded.
2. It is not a sufficient compliance with the law, in such cases, to charge ill treatment generally, or that the condition of *feme* plaintiff was intolerable by reason of her husband's conduct; the complaint ought to show the particulars of the ill-treatment, and that it was without provocation on her part.
3. The complaint ought to show, and the Court, before granting such divorce, must see, either that the husband abandoned his family, or maliciously turned the plaintiff, his wife, out of doors, or endangered her life by cruel, torturous treatment, or offered such indignities to her person as rendered life a burden.
4. Where, in such case, facts stated in the complaint were not sufficient to constitute a cause of action: *Held*, that a motion to dismiss, made for the first time in the Supreme Court, should be allowed.
5. The defects in this case were such as might have been cured by amendment of the complaint, by leave of the Court, so as to correspond with the verdict and judgment.

This was an ACTION for divorce, tried at October Term, 1889, of the Superior Court of WAKE County, before *Armfield, J.*

The complaint was as follows:

Cornelia A. R. Jackson, the plaintiff in the above entitled action, complains of the defendant Daniel Jackson, and says:

1. That she was lawfully married to the said Daniel Jackson about A. D. 1845; that she has been a true and faithful wife to him, and they raised several children.

2. That up to a few years ago she has lived with the said Daniel Jackson in comparative peace and quiet, doing her duty faithfully as a wife and mother.

3. That since his severe sickness (about 1884) he has become, in a measure, impotent, and generally unable to perform family duty, and, in consequence, became violently jealous of her, the said plaintiff, and began to treat her cruelly and barbarously, so as to endanger her life—frequently at night, when no other person in the house was awake, taking his fist and threatening to mash her brains out, and that, in consequence, she was afraid to retire to rest at night.

4. That recently he maliciously turned her out of doors, and refused to allow her to return to her home, threatening that if she did so return he would kill her.

5. That the tract of land on which the said Daniel Jackson now resides, and from which he turned her out, is her separate estate, and she also has some articles of personal property now in the possession of the defendant; that the defendant's annual income is about $500

Therefore, she prays the Court—

1. That she be granted a divorce from bed and board from the defendant Daniel Jackson.

2. And for alimony.

3. For her costs in this action, and for such other relief as the Court shall direct.

After denying specifically each allegation of the complaint, for a further defence defendant says:

1. That some time during the summer of 1888 his wife did go from home to a certain place he was opposed to her going, to-wit, to a certain church, of which defendant had been a member, which church had been recently removed from the old place where it was originally located, against the defendant's will and desire, and after its removal he did not wish his wife to go to the same, and he

was angry when she did go; but he soon got over his anger and tried to get plaintiff to come back to her home and live as she had done for so many years, promising to treat her kindly and furnish her to go where she pleased and come when she chose; defendant offered to divide his lands with her and give bond that he would in nowise impose on her; for two years past plaintiff has not demeaned herself towards defendant as a wife should.

2. That defendant has no ill feelings toward his wife, but is earnestly desirous that she should return to her home; that she has been to his house once since she left, and offered to come and live with defendant if he would enter into a bond in the sum of two hundred dollars not to mistreat her, which defendant then and there agreed to do, and parted with her with this understanding; but defendant is informed, and believes, that she was dissuaded from coming back to her home by other parties; and he believes that, if she was left free from persuasion of others, she would return and live with him, as he desires she should, and as she agreed to do.

3. That defendant is a cripple, unable to walk without a crutch which he has had to use for thirty-six years; he is in the sixty-fourth year of his age; his property consists of a tract of land containing one hundred and thirty-five acres, one horse, and hogs, a little house furniture, a few farming tools, and a small amount of provision on hand, not more than enough to last him three months—this constitutes defendant's whole property. He has no income beyond a support from his farm, and last year his farm did not pay expenses. He is unable to work and has to depend on the labor of others to make a support out of his land, and a bare support is all that it will yield him, especially in the absence of his wife he having to hire everything done.

Defendant is anxious that his wife should return to her home, and offers to live in peace with her and make her home as pleasant as it is in his power to do, and provide for her to the extent of his ability.

CASE ON APPEAL.

There was evidence from the plaintiff and other witnesses tending to show that defendant, for a number of years, by cruel and barbarous treatment, endangered the life of plaintiff, and that defendant, on numerous occasions, offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome; that this occurred over six months before the filing of the complaint.

The witnesses testified that defendant, upon many occasions, drove plaintiff from his bed and inflicted serious bodily injury upon her person by kicking, bruising and the like, and, on one occasion, struck her on the head a terrible blow with a large stick, and nearly killed her; and that defendant continued this treatment until he maliciously turned plaintiff out of doors a few days before this action was brought; and there was no exception to this evidence.

His Honor withheld the third issue from the jury because it appeared in evidence that the defendant turned plaintiff out of doors within six months before the complaint was filed; and all the issues set out in the record (except the third issue, which was withdrawn from the jury) were found in favor of the plaintiff.

Upon the question of alimony, the Court offered to hear evidence from the defendant. No evidence was introduced by him, and the Court, being satisfied that the alimony set out in the judgment was reasonable and fair, after hearing the evidence, gave the judgment set out in the record.

Defendant offered to prove that, after the commencement of this action, he had sent word to plaintiff to come back and live with him, and he would "treat her just as he always had."

The Court excluded this testimony, and the defendant excepted. Verdict for plaintiff. Defendant appealed.

The issues and findings were as follows:

1. Have the plaintiff and defendant been lawfully married, and have they lived together as man and wife? Answer: Yes.

2. Have plaintiff and defendant been citizens and residents of the State for two years before bringing this action? Answer: Yes.

3. Did the defendant maliciously turn plaintiff out of doors? (*This issue not given to jury.*)

4 Did the defendant, by cruel and barbarous treatment, endanger the life, or, permanently, the health of plaintiff? Answer: Yes.

5. Did the defendant offer such indignities to the person of plaintiff as to render her condition intolerable and life burdensome? Answer: Yes.

6. Was the defendant insane and irresponsible for his actions at the time of the happening of the causes alleged for divorce? Answer: No.

7. Has the defendant offered, in good faith, since the happening of the alleged causes of divorce, to take the plaintiff back to his home and treat her kindly? Answer: No.

The Court rendered judgment that the plaintiff be divorced from bed and board; for an allowance of fifty dollars, to be paid before January 1st, 1890; for the rents from one-third of defendant's land, to be laid off by the surveyor and two freeholders, as alimony, who were to report to the next term, the cause being retained for further hearing.

Messrs. J. B. Batchelor and *Jno. Devereux, Jr.*, for plaintiff.
Mr. J. H. Fleming, for defendant.

AVERY, J., after stating the facts: The defendant's counsel moves in this Court to dismiss because the facts stated in the complaint are not sufficient to constitute a cause of action, and we think that the motion should be allowed. The Judge properly refused to submit the issue growing out of the fourth paragraph of complaint and answer, because there was no evidence tending to show that the plaintiff had been turned out of doors by her husband more than six months before the action was brought. The petition rests for support solely upon the allegation that the husband "became violently jealous of her, the said plaintiff, and began to treat her cruelly and barbarously, so as to endanger her life; frequently at night, when no other person in the house was awake, taking his fists and threatening to mash her brains out, and that, in consequence, she was afraid to retire to rest at night." It is not a compliance with the law, in such cases, to charge ill treatment generally in the complaint, nor to state simply that the condition of the complainant was intolerable and her life burdensome by reason of the conduct of her husband towards her. It must appear to the Court, from specific allegations as to the treatment of the husband on particular occasions that he, without sufficient provocation on her part to justify his conduct, either abandoned his family, maliciously turned her out of doors, endangered her life by cruel and barbarous treatment, or offered such indignities to her person as to render her condition intolerable and her life burdensome. The Court must see that if the complainant can make good her allegations by proof, the case will be brought within the provisions of the statute. *Wilcox* v. *Wilcox*, 1 Ired. Eq., 36; *Erwin* v. *Erwin*, 4 Jones' Eq., 82; *McQueen* v. *McQueen*, 82 N. C., 471; *White* v. *White*, 84 N. C., 340; *Scoggins* v. *Scoggins*, 85 N. C., 347; *Everton* v. *Everton*, 5 Jones, 202; *Joyner* v. *Joyner*, 6 Jones' Eq., 322; *Harrison* v. *Harrison*, 7 Ired., 484.

The marriage contract is the most important to society in the catalogue of contracts, and the Courts have held parties seeking divorce to strict proof, not only in conformity to a fair construction of the statutes relating to the subject but in accordance with the dictates of public policy. We can find no satisfactory allegation that her husband endangered her life by cruel and barbarous treatment, for it does not appear that he struck or offered to strike her, but the specification is "by taking his fists and threatening to mash her brains out, and that, in consequence, she was afraid to retire to rest," &c. Neither does it appear that he offered any indignity whatever to her person. So that the petitioner does not bring her case within the meaning of the statute. But if it were doubtful whether his conduct, considered alone, would furnish sufficient ground for the application, the Court must know more fully the circumstances under which the threats were made, and especially whether these threats were uttered under the influence of a sudden ebullition of harmless passion, provoked by some taunting language or more active demonstrations of hostility on her part. While it is not necessary to specify the precise time, it is but just to the defendant that the occasion, or occasions, on which he indulged in such threats and exhibitions of temper should be so identified, by giving the attendant circumstances, as to enable him to understand the precise charge preferred against him, and prepare to meet it by proof, if he can. *Joyner* v. *Joyner*, *supra*; *Everton* v. *Everton*, *supra*; *White* v. *White*, *supra*.

If threats of violence and exhibitions of jealousy are accompanied by withdrawal of intercourse, or by turning the wife out of the husband's house, without provocation, then such facts constitute sufficient ground for the application. The cases of *Taylor* v. *Taylor*, 76 N. C., 436; *Coble* v. *Coble*, 2 Jones' Eq., 392; *Griffith* v. *Griffith*, 89 N. C., 114, and *Erwin* v. *Erwin*, 4 Jones' Eq., 82, are distinguishable from this, in the fact that there was an allegation of expulsion of the wife from her husband's house, or refusal of marital intercourse, in all of them so long before the bringing of the action as to permit proof of the fact.

The motion made by defendant's counsel must be entertained by the Courts exercising either original or appellate jurisdiction at any stage of the proceeding in either Court, and the power may be exercised *ex mero motu* when the failure of a plaintiff to acquire a status in Court, by stating a cause of action, is manifest. *Knowles* v. *Railroad*, 102 N. C., 62.

The radical defect in this case could have been cured only by amendment of the complaint, by leave of the Court, upon such terms as might have been prescribed, so as to make its allegations correspond with the proof and verdict. *McQueen* v. *McQueen*, *supra*. There must be a *venire de novo*.

Error. New trial.

FALLS OF NEUSE MANUFACTURING CO. v. J. M. BROWER et al.

Venue—Removal of an Action and Discretion of the Judge.

1. When an action relating to real estate is brought in a county other than that in which the land is situated, the Judge *must*, upon proper application made in apt time, direct its removal to the proper county.
2. The fact that there are other questions to be determined in the action, does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending.
3. The question of removal, when the action is not brought in the proper county, is not one of discretion; when the statute imposes a duty, "may" means *must*.

(SHEPHERD, J., dissenting.)

This is an APPEAL from the refusal of *Armfield, J.*, at October Term, 1889, of WAKE Superior Court, to make an order for the removal of the cause to Surry County for trial.

The allegations of the complaint, so far as material to the question now before us, are, substantially, that on the 1st of September, 1881, the Falls of Neuse Manufacturing Company, Richard T. Nutt and J. M. Brower entered into an agreement, set out as part of the complaint, to form a company to be chartered by the Legislature, by which agreement, among other things, the said Brower was to put into the said company a certain tract of land known as "Buck Shoals," containing about 125 acres, on which there was a cotton factory building, and on which there was a mortgage; that said Brower was to pay off the said mortgage, and, for the payment thereof, "the interest of the said Brower in said property was to be bound"; that the company was not incorporated, but the parties became partners under the name and style of the "Brower Manufacturing Company," and proceeded to put in order and furnish the factory building near Mt. Airy, and commenced the manufacture of cotton, &c.; that certain contributions to the capital (set out in the complaint) were made by the partners; that the company contracted debts, some of which are outstanding and unpaid; that the factory buildings, machinery, &c., were insured against fire; that they were destroyed by fire, and, after much litigation, the claims of the Brower Manufacturing Company against the insurance companies were compromised at $10,000, and of this sum the Falls of Neuse Manufacturing Company received the gross amount of $5,580.52, and John M. Brower received the gross amount of $4,419.48; that Nutt had conveyed his interest in the company to the plaintiff corporation, but the latter had no interest in the $10,000 compromise.

That at the time of entering into the agreement, the land and buildings which the defendant Brower agreed to put in as part of his capital stock to said company were mortgaged by the said Brower and his wife to the defendant J. C. Buxton by deed set out with the complaint.

That payments have been made upon the debts secured by said mortgage until the amount remaining due thereon, as plaintiffs are informed and believe, is now about four thousand dollars.

That the property conveyed in said mortgage is much more than the "Buck Shoals" tract, which, alone, John M. Brower contracted to convey, freed from encumbrance, to the said "Brower Manufacturing Company," and, as plaintiffs are informed and believe, the land conveyed by said mortgage, other and outside of the Buck Shoals tract, is of a value more than sufficient to pay off and discharge what is due upon the debt secured by said mortgage.

That the defendant John M. Brower never made a deed for Buck Shoals to the Brower Manufacturing Company, as he ought to have done, with relinquishment of her right of dower by his wife, the defendant Nannie M.

That the Buck Shoals tract aforesaid contains one hundred and twenty-five acres, much of it valuable for farming purposes, and situate on it are good dwelling-houses, and that defendant John M. Brower has been in possession of said land and buildings since the occurrence of the fire in 1883, and has paid no rent therefor.

Wherefore, the plaintiffs demand judgment against the defendant—

1. That J. C. Buxton, trustee, may be ordered, and required, to sell enough of the lands of John M. Brower and wife, other than Buck Shoals, to pay off and discharge the balance of the debts secured, and only resort to a sale of the Buck Shoals, or so much thereof as may be necessary, to make good the deficiency.

2. That J. M. Brower may be ordered to convey to the "Brower Manufacturing Company" Buck Shoals in fee-simple, with the relinquishment of the rights of dower by his wife, the defendant Nannie M., if she will consent thereto.

3. That if said Nannie M. will not relinquish her right of dower in said Buck Shoals, then that the value of said dower right may be ascertained and charged to the defendant John M. Brower.

4. That the co-partnership, the "Brower Manufacturing Company," may be dissolved, and that the assets and property be converted into cash, and, after paying its debts, the surplus be divided between the plaintiffs and the defendant John M. Brower as their respective rights and interests may be.

5. That an account may be taken of the assets and liabilities of the said co-partnership, and the amount the plaintiffs and defendant John M. Brower are entitled to recover.

6. That pending the litigation, and until the further order of the Court, and for the care and preservation of the property of the said co-partnership, some suitable person be appointed receiver thereof, under the directions of this Court.

7. For the costs of this action.

8. For such other and further relief as the needs and circumstances of the case may require, and as to the Court shall seem meet.

It appears from the complaint that all the real estate mentioned therein is situate wholly in the county of Surry. Upon affidavit in writing that the mortgage set out in the complaint, and sought to be foreclosed, "is registered and refers to real estate in Surry County, N. C.," and that "Buck Shoals," the right and interest in and to which are sought to be determined by this action, is situated wholly in Surry County, the defendant, before the time of answering had expired, and in writing, moved and demanded that the action be removed to Surry County. The motion and demand were denied by the Court.

Exception and appeal by defendant.

The sole question presented for consideration is, "Was the defendant entitled to an order of removal of the cause to the county of Surry for trial?"

Mr. E. C. Smith, for plaintiff.
Mr. T. R. Purnell, for the defendants.

DAVIS, J.—after stating the facts: By § 190 of *The Code*, actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property; * * * for the foreclosure of a mortgage of real property," * * * must be tried in the county "in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial in cases provided," in *The Code*

By § 195 it is provided that: "If the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demands, in writing, that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the Court." It is also provided in said section that "the Court may change the place of trial in the following cases:

"1. When the county designated for that purpose is not the proper county.

"2. When the convenience of witnesses and the ends of justice would be promoted by the change.

"3. When the Judge shall have been, at any time, interested as party or counsel."

The question of removal, when the action is not brought in the proper county, is not one of discretion, but "may" means *shall* or *must*, as it is construed in every act imposing a duty. *Pelletier* v. *Saunders*, 67 N. C., 262; *Jones* v. *Statesville*, 97 N. C., 86, and cases there cited.

In New York they have a statute similar to ours, and a similar construction has been put upon the word "may," and it is held that the removal, when the action is not brought in the proper county, "is a matter of right." Green's Pleading and Practice; under *The Code*, §§ 624 and 625, and the cases there cited. The Judge may determine "when the convenience of witnesses and the ends of justice would be promoted by the change," and his determination of those questions would be conclusive, ordinarily, but his discretion is a legal, and not an arbitrary one, even in those cases. He determines whether the grounds for removal exist, and his discretion in this is not reviewable; but when the action with reference "to the subject-matter" is not brought in the proper county, he *must*, if the demand be made in writing, and before the time of answering expires, "change the place of trial" to the proper county. The chief, and, so far as Buxton is concerned, the only purposes of this action are to compel J. C. Buxton, the trustee, to sell lands in the county of Surry, and to order Brower to convey the Buck Shoals lands to the Brower Manufacturing Company with relinquishment of the rights of dower by his wife, or, if she refuse to do so, then to have its value ascertained and charged to Brower. Neither Buxton nor Mrs. Brower are in any way parties to the co-partnership styled the Brower Manufacturing Company, and, as to them, the action is purely local, and the place of trial, clearly, under section 190 of *The Code*, is in the county of Surry; and though there are demands for a dissolution of the co-partnership, and an account of its assets and liabilities, and for the appointment of a receiver, yet all the property in controversy is situated in Surry County, and the action is one, substantially, to settle rights relating to, and have a foreclosure by sale of, real estate in Surry County, and the receiver, if one shall be appointed, will be charged with duties purely local; and there was error in refusing to make the order of removal. *Fraley* v. *March*, 68 N. C., 160; *Jones* v. *Statesville, supra.*

Error.

SHEPHERD, J.—dissenting: The object of this action is to dissolve a co-partnership and to wind up its affairs, and it cannot be doubted that, for this purpose, it is brought in the proper county. Indeed, this is conceded, and I am unable to understand why the jurisdiction should be ousted because a part of the partnership assets is situated in another county. If this be the rule, it will be exceedingly difficult, in many cases, to determine where such an action may be brought, as a co-partnership may have real assets in many different sections of the State. It will also be observed that a receiver is asked for, who, in the event of his appointment, may bring an action against Buxton in the county where the land is situated. His Honor, in his discretion, for the convenience of parties, witnesses, &c., might have ordered a removal, but I cannot agree that the statute *required* him to do so.

ELIZABETH J. SMITH et al. v. W. B. FORT et al.

Final Judgment—Fraud—Irregularity—Remedy.

1. Where a final judgment or decree has been rendered in a cause, and it is sought to impeach it for fraud, or for serious irregularity in the proceedings, not apparent in the record, the remedy is by a new and independent action, and not by a motion in the original cause.

2. Where a motion in a cause, which had been terminated by final judgment, was made, upon notice to the parties and supported by the affidavits, but no pleadings had been filed, or issues joined, or any consent entered to treat the motion as an independent action, it was error in the Court, of its own motion, and in its discretion, to so consider and dispose of it, and the Supreme Court will *ex mero motu* correct such error.

CIVIL ACTION, tried at Spring Term, 1889, of WAYNE Superior Court, *Whitaker, J.*, presiding.

In his life-time, John Coley, now deceased, contracted, in writing, to sell and convey to Thomas R. Smith, likewise now deceased, for a stipulated price, the tract of land specified in the complaint. The said Smith died, leaving a last will and testament, which was duly proven, and the plaintiff W. F. Gardener qualified as executor thereof. The said Coley also died intestate, and the defendant W. B. Fort was duly appointed administrator of his estate. The contract of sale above mentioned was not executed at the time of the death of said testator and said intestate.

This action was brought in the Superior Court of the county of Wayne by the plaintiffs' devisees of said will and the executor thereof, against the heirs at law and said administrator of said intestate, to compel specific performance of said contract.

At Spring Term, 1876, of the Court mentioned, a judgment was rendered in favor of the plaintiffs for $2,099, with interest from January 20th, 1876, for certain rents of part of the land, received by the said administrator, and, likewise, judgment was also then rendered in favor of the defendant administrator against the said executor plaintiff for $2,004.34, with interest from January 30th, 1876, balance of purchase-money of the land. It was then further adjudged that the land be sold, subject to homestead, to pay the last mentioned judgment, and John R. Smith was appointed commissioner to make sale thereof. The following is a copy of so much of the judgment as directs such sale:

"It is further adjudged that the land described in the pleadings be condemned and sold, subject to the homestead thereon, for the satisfaction of the above judgment, on a credit of six months, after thirty days' advertisement at four public places in Wayne County, to be sold at the court-house door in Goldsboro, note and security for the purchase-money at 8 per cent. interest. It is further ordered that John R. Smith be appointed a commissioner to sell said land on the above terms, and report his proceeding to this Court."

At the Fall Term of 1876 of the Court, the said commissioner reported that he had made sale of the land, and the Court ordered, as follows:

"The Commissioner having reported that the land described in the pleadings sold for a just price, and there being no exceptions to the sale, the same is confirmed. It is further ordered that on payment of the purchase-money the commissioner, John R. Smith, make title in fee for the same, subject to the homestead."

Afterwards, on the 14th of November, 1876, the said commissioner executed to the purchaser of the land a deed therefor, and the following is as much thereof as need be reported:

"Whereas, John R. Smith, as commissioner, sold the lands hereinafter described, on the 7th day of August, 1876, to W. A. Deans, for three thousand and fifty dollars, in pursuance of an order made at Spring Term, 1876, of Wayne Superior Court, in the action of Elizabeth John Smith and others *v.* W. B. Fort and others; and whereas, at Fall Term, 1876, it was ordered therein that said commissioner, upon payment of the purchase-money, make title to said purchaser for the premises, subject to the homestead thereon:

"Therefore, this deed, made by John R. Smith, commissioner, to William A. Deans, both of Wayne County, Witnesseth: that the said John R. Smith, in consideration of three thousand and fifty dollars, has sold and hereby conveys to the said W. A. Deans, his heirs and assigns," &c.

Afterwards, at Fall Term, 1877, the Court rendered judgment, the material parts whereof are as follows:

"This action coming on for final judgment, and it appearing that John R. Smith has been duly appointed a guardian of the plaintiffs, Elizabeth John Smith, Richard Greene Smith, Polly Ann Smith and Amy Lee Smith, it is ordered that the amount of the judgment heretofore rendered in favor of said plaintiffs against the defendant W. B. Fort, administrator of said John Coley, to-wit: the sum of two thousand and ninety-nine dollars and twenty-one cents ($2,099.21), with interest from January 30th, 1876, be paid over to John R. Smith, as guardian of said Elizabeth John Smith, Richard Greene Smith, Polly Ann Smith and Amy Lee Smith. It is further ordered that said John R. Smith, guardian, pay to A. K. Smedes, referee, out of said money the sum of twenty-five dollars, heretofore ordered to be paid to him by the said plaintiffs."

It is further ordered that John R. Smith, heretofore appointed commissioner to sell the land described in the pleadings, and make title, pay out the proceeds of sale of said land the costs of this action, and to W. B. Fort, administrator of John Coley, the sum of two thousand and four dollars and thirty-four cents ($2,004.34) with interest from the 30th of January, 1876. It is further ordered that said John R. Smith, commissioner, be allowed the sum of fifty dollars for selling said land, making title, &c., and that he retain the same out of said proceeds of sale. It is further ordered that the commissioner, John R. Smith, pay Wm. T. Dortch out of the balance of said fund the sum of one hundred dollars for professional services rendered to Wm. T. Gardner, executor of said Thomas R. Smith, and that he pay over the remainder to Wm. T. Yelverton, Clerk of this Court, to be disposed of as the Court shall hereafter order, unless said W. T. Gardner, executor of said Thomas R. Smith, shall enter into bond with good security to dispose of said fund according to law, and in the event of the said Gardner giving said bond that said fund be paid to him.

On the 17th of November, 1876, the said Deans, the purchaser of the land, and his wife, conveyed the land so purchased to the said John R. Smith in fee; and afterwards the latter and his wife conveyed a part of the said land to the plaintiffs' devisees, subject to the homestead of the testator named. Afterwards, the said Smith sold and conveyed the balance of said land in parcels to divers persons, "who held said lands for value and without notice of the plaintiffs' equities other than such as is contained in the report of sale, judgments and deeds hereinbefore set out."

Afterwards, at January Term, 1890, upon proper notice to the defendants and all parties interested in said land and the plaintiff John R. Smith, the plaintiffs, appellants herein, moved the Court to set aside the order of sale heretofore made in said cause, cancel the deed from John R. Smith, commissioner, to W. A. Deans, for the land described in said order of sale, and the deed from W. A. Deans to said John R. Smith for said land, and all *mesne* conveyances by which any of said lands were conveyed to John W. Isler, Sr., Asher Edwards, Hardy Shadding, Alex. Exum, James Joyner, Jacob Screws, W. H. Smith, or either of them; that the judgment in favor of said plaintiffs against W. B. Fort, administrator of John Coley for $2,099, and the judgment in favor of W. B. Fort, administrator as aforesaid against W. T. Gardner, executor of Thomas R. Smith, for $2,004.34 be satisfied of record, and that the defendant be decreed to convey the land described in the complaint to the hereinbefore named plaintiffs, and for such other and further reliefs as they may be entitled to in the premises.

The Court heard the motion upon affidavits offered by plaintiffs and defendants, upon which hearing it rendered judgment in which it finds that John R. Smith, through the agency of W. A. Deans, was the purchaser at his own sale at a grossly inadequate price; that the judgment at Spring Term, 1877, was a final judgment, and that the plaintiffs' remedy herein was by a new action and not by a motion in the cause, and the Court, in its discretion, considered the motion of the plaintiffs as a new action, and finds that John R. Smith, on November 17th, 1876, conveyed what purported to be 400 acres of said land to plaintiffs appellants in fee, and that John R. Smith, as guardian of plaintiffs appellants, and W. B. Fort, administrator of John Coley, agreed that the judgment in favor of said appellants against W. B. Fort, administrator of John Coley, and the judgment in favor of W. B. Fort, administrator, against W. T. Gardner, executor of Thomas R. Smith, should satisfy each other *pro tanto*, and said Fort paid the difference, to-wit, $94.87, to said John R. Smith, and that John R. Smith paid out of said purchase-money the amounts directed to be paid by the several orders in said action, except the said sum of $2,004, which said sum of the purchase-price of said land the Court finds was not paid; and the Court further finds that the purchasers of said land from John R. Smith, hereinbefore named, who now holds it, purchased for value, without any notice of the plaintiffs' equity, or any other equity, and the plaintiffs' motion was refused and John R. Smith adjudged to pay the costs in this proceeding.

To said findings, rulings and judgments plaintiffs appellants excepted, as follows:

1. That the Court erred in holding that the plaintiffs were not entitled to seek relief herein by motion in the original cause. (Other exceptions need not be reported.)

The plaintiffs appealed.

Mr. W. C. Monroe, for plaintiffs.

Mr. W. R. Allen (*Messrs. Aycock & Daniels* filed a brief), for defendants.

MERRIMON, C. J.—after stating the facts: The Court below held properly that the judgment rendered in the action at the Fall Term, 1877, of the Court was final. It not only purported to be such a judgment, but it was such in its nature and effect. The Court had jurisdiction of the parties to, and the subject-matter of, the action, and in the orderly course of procedure disposed of and put an end to the whole matter embraced by the litigation.

The counsel for the appellants insisted, on the argument, that the purchase-money of the land was not paid before the commissioner executed his deed to the purchaser, as the order of the Court required, or at all, and there could be no final judgment until this should be paid. If this be granted as true, and we do not decide that it is or is not—it appears from the record—the judgment itself—that the Court understood and acted upon the supposition that it had been paid. The judgment purports and undertakes to dispose of the fund arising from the sale of the land, as well as other funds embraced by it. The proceedings in the action were not irregular, otherwise than as fraud may have been perpetrated by the commissioner, or some other person in some way connected with the action, that led the Court to make some material order or judgment it would not have made if the facts had appeared.

If the Court might take notice of the deed of the commissioner made to Deans, the purchaser, in connection with the judgment, no substantial irregularity appears in or by it. It is not very formal, but it is not, upon its face, void, taken in connection with the order confirming the sale. Any fraud or mistake affecting it does not appear in it. It recites the substance of the order of sale—that a sale was made—the order of confirmation of the same, and that it was made in consideration of the sum of money bid for the land. These recitals, taken together, fairly imply that the purchase-money had been paid—they do not suggest the contrary, especially when taken in connection with the final judgment.

There was not, therefore, such irregularities in the orders and judgments, interlocutory or final, or any of them, or in the proceedings leading to them, as might be corrected by a simple motion in the cause.

The ground of the plaintiffs' motion seems to be that the deed and judgment are fraudulent. If so, their remedy is not by motion, but, as this action is ended, by an independent action, alleging therein the fraud and demanding appropriate relief as against all parties as to whom and against whom they have a cause of action by reason of such fraud. This is well settled. *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125; *Peterson* v. *Vann*, 83 N. C., 118; *England* v. *Garner*, 84 N. C., 212; *Fowler* v. *Poor*, 93 N. C., 466; *Williamson* v. *Hartman*, 92 N. C., 236; *Mock* v. *Coggin*, 101 N. C., 366.

The Court, in this case, said that, "in its discretion it considers the plaintiffs' motion as a new action," and it proceeded to hear and deny the motion. We think it should not have done so. The plaintiffs suggested, by informal motion, only a cause of action, distinct from that alleged in this action, that ought to be the subject of a new and independent action. New parties were made to the motion by simple notice—the motion was made informally *ore tenus*—there was no petition or complaint filed alleging the grounds of the motion, or alleging a cause of action in a supposed new or independent action, and there was no answer or demurrer to a supposed complaint. A serious suggested cause of action, involving numerous controverted questions of fact and law, was heard and disposed of by simple motion! Such procedure and practice are unwarranted by the Code of Civil Procedure, or any statute, and we are sure that it ought not to be allowed to prevail. No doubt the Court was misled by what is said in *Stradley* v. *King*, 84 N. C., 635.

In that case, a motion in the cause was improperly made in the action, and the Court treated it as an independent action; but there the Court said "an impeaching complaint, in the form of a petition, is filed, and the answer thereto put in by the administrator, evidence is offered and heard, and, without any demand for a jury or objection to the course of the Judge in passing upon the facts, he finds them, and thereon bases his judgment. All the requirements of a new and independent action seem to meet in the course pursued to bring up the matter complained of for a rehearing." In that case, the parties, in substance, constituted a new action before the Court, observing such authorized method of procedure as presented the pleadings of the parties of record, and the action of the Court thereupon. That could be done only by consent, and while such loose practice may be tolerated, it ought not to be encouraged. In the present case there was no pleading The plaintiffs insisted upon what they deemed their grounds of motion in the cause—they did not allege or attempt to treat their grounds of complaint as a cause of action, growing out of fraud in the judgment and the deed. The counsel of the appellants has argued the case here as a motion in the cause to correct irregularities. It is true, the parties did not except specially to the course of informal procedure adopted by the Court, but we may, as we do, *ex mero motu*, take notice of it and declare that it cannot be allowed to prevail. *Long* v. *Jarratt*, 94 N. C., 443. The Court should have simply dismissed the plaintiffs' motion, leaving them to adopt such other remedy as counsel might advise.

The judgment must be reversed, and judgment entered dismissing the motion at the cost of the parties making it.

Error.

W. B. NORRIS et al. v. N. S. STEWART'S HEIRS.

Evidence — Transactions with Deceased Persons — Character — Fraud — Objection to Testimony — Witness.

1. The wife of a deceased husband is a competent witness in an action affecting his estate, except as to transactions and communications between herself and him, though she be interested in the result of the suit.
2. Objection to the introduction of such inhibited transactions and communications must be interposed when the witness is proceeding to testify.
3. Evidence of general good character is not admissible as a defence against an allegation of *fraud*.
4. It is essential that the character be put in issue by the nature of the action itself before such evidence is admissible.

This was a CIVIL ACTION, tried at November Term, 1889, of HARNETT Superior Court, before *Armfield, J.*

The plaintiffs complained that the defendant Stewart had, by false and fraudulent representations and pretences, obtained the signature of Amos Johnson, father of *feme* plaintiff, to a deed of conveyance to certain lands. Stewart died after suit commenced, and his heirs were made parties. One Rachel Johnson, widow of Amos Johnson, introduced in behalf of plaintiffs, was allowed to testify, after objection by defendants as to her competency to testify to transactions or communications other than those between herself and her deceased husband. She also, afterwards, but without special objection interposed, testified of such transactions and communications. She testified further that he was a drinking man and got on sprees; that defendant Stewart could influence him. There was also other testimony tending to show that Stewart was the agent of Amos Johnson.

The defendants introduced the testimony of Maria Britt, tending to disprove that of Rachel Johnson; and other evidence to show that she, Rachel, lived on bad terms with her husband, and that she was, at one time, a woman of bad character.

Defendants then offered to show, in contradiction of Rachel Johnson's testimony, and for general purposes, that defendant Stewart's character was good.

Upon objections by plaintiffs, this was ruled out, and defendants excepted.

Verdict and judgment for plaintiffs. Motion for new trial overruled. Appeal by defendants.

Mr. R. P. Buxton, for plaintiffs.
Mr. F. P. Jones, for defendants.

SHEPHERD, J.: 1. When Rachel Johnson was introduced in behalf of the plaintiffs, her competency was objected to by the defendants. The Court overruled the objection, and the defendants excepted. Conceding that she was interested in the result of the action, it is too plain for argument that she was a competent witness, the only restriction being that she could not testify as to any transaction or communication between herself and her deceased husband. *The Code*, § 590. Being a competent witness, the general objection was properly overruled, and she was permitted to testify to many matters which were not inhibited by the above section of *The Code.* When she was proceeding to testify to such inhibited transactions and communications, it was the duty of the defendants to interpose their objections, and as they failed to do so, they must be deemed to have waived them.

2. The exception to the refusal of his Honor to admit the testimony as to the good character of Stewart, is likewise without merit.

The action is brought by the heir at law of Amos Johnson for the purpose of setting aside a deed executed by him to Neill S. Stewart, the ancestor of the defendants, on the ground that said Stewart obtained the execution of the said conveyance by fraud and undue influence. There was testimony tending to sustain the allegations of the plaintiffs, and the testimony as to character was offered to contradict such testimony, and for "general purposes."

As a general rule, evidence of good general character is inadmissible, by way of defence, in civil actions in which a party is charged with a specific fraud, because the character of every transaction must be ascertained from its own circumstances, and not from the character of the parties. *Fowler* v. *Ætna Ins. Co.*, 6 Cowan, 673; 16 Am. Dec., 460.

Such evidence is not admitted in civil actions unless the nature of the action involves the general character of the party, or goes directly to affect it. 1 Greenleaf, § 54; 1 Phil. Ev., 10th ed., 757; *Church* v. *Drummond*, 7 Ind., 17; *Gutzwiller* v. *Lackman*, 23 Mo., 168; *Porter* v. *Seiler*, 23 Pa. St., 424; *Ward* v. *Herndon*, 5 Port., 382. In such a case, no matter how serious a moral delinquency may be involved in a fact, and how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact. *Smets* v. *Plunket*, 1 Strobb., 372.

In civil cases, where the question of character is directly in issue, and material as to the amount of damages, as in seduction, or slander, evidence of character is admitted. *Wright* v. *McKee*, 37 Vt., 161.

The foregoing authorities, taken from the able and discriminating note of Mr. Freeman to the case of *O'Bryan* v. *O'Bryan*, 53 Am. Dec., 133, are entirely sustained by the decisions of this and other Courts, both in England and America. See *Heileg* v. *Dumas*, 65 N. C., 214; *McRae* v. *Lilly*, 1 Ired., 118.

It is contended, however, by the defendant, that Stewart's character was put in issue. This is a misconception. The true rule is laid down by TILGHMAN, C. J., in *Anderson* v. *Long*, 10 Sergt. & Rawle, 61: "The plaintiff's counsel say that the character of James Anderson was put in issue here, because the defendant accused him of fraud. But that is not putting character in issue. By the same mode of reasoning, the defendant's character is put in issue in every action of assumpsit, because the declaration charges him with an intent to *deceive* and *defraud* the plaintiff. Indeed, in most of the controversies in Courts of Justice, it may be said, with some degree of truth, that character is in question, because an honest man would not act with injustice. But *putting character in issue* is a technical expression, and confined to certain actions, from the nature of which the character of the parties, or some of them, is of particular importance. Such is the action brought by one man against another for seducing his wife and having criminal connection with her. There the injury done to the plaintiff consists mainly in the good conduct of his wife before her seduction, and, therefore, the defendant is permitted to show that she is unchaste. So, in an action for slander, the plaintiff in his declaration asserts his own good character, and avers the intent of the defendant to rob him of it. He puts his character in issue, therefore, and the defendant is at liberty to impeach it. But it has never been supposed that character is put in issue merely by the charge of fraud made by one party against the other."

Thus where, in ejectment, the title depended upon the question whether a party had committed a fraud in procuring a will, he was not allowed to show his good character. Bul. N. P., 296. So, where an information was filed against a defendant under the excise laws to recover a penalty for his keeping false weights, his good character could not be brought into the evidence. 2 Bos. & Pul., 532.

In *Gough* v. *St. John*, 16 Wend., 646, it was held that evidence of the good character of the defendant for honesty and fairness was not admissible in an action on the case for fraudulent representation. COMAN, J., said that it was agreed "that this action charges the obtaining of checks by false pretences, which is a felony by the revised statutes. I answer, as did DOGGETT, J., in *Humphrey* v. *Humphrey*, 'causes charging cruelty, gross fraud, and even forgery, are often agitated in suits by individuals; and the result not unfrequently affects the property and reputation of the party deeply; yet, no individual has been permitted to attempt to repel the proof by showing a good reputation."

In *Woodruff* v. *Whittlesey*, Kirby R., 60, the issue was whether there was a fraudulent transfer of a heifer, and the Court excluded testimony as to the good character of the parties to the alleged fraudulent conveyance. So, where the defendant was charged with burning wheat belonging to the plaintiff, evidence of good character was held inadmissible. *Burton* v. *Thompson*, 56 Iowa, 571.

These cases serve to illustrate what is meant by putting character in issue, and show, very conclusively, that our case does not fall within the rule which permits the introduction of the testimony offered by the defendants.

Affirmed.

W. T. BLACKWELL v. W. B. McCAINE.

Appeal—Final Judgment—Interlocutory Order—Exceptions.

1. Where the jury rendered their verdict for the plaintiff, and thereupon the Court, before rendering judgment upon the verdict, made an order of reference for an account between the parties to ascertain the balance due, to which no exception was made, but defendant appealed: *Held*, that such appeal must be dismissed as premature.
2. When the Court below enters interlocutory judgments or orders, exceptions taken thereto cannot, generally, be brought up for review until after final judgment.
3. When appellant is not seriously prejudiced by delay, and not deprived of any substantial right by the rendition of an interlocutory judgment, &c., the regular and orderly method of procedure is to except and proceed to final judgment, so that the appeal may bring up the whole case at once.

This was a CIVIL ACTION, tried at March Term, 1889, of DURHAM Superior Court, before *Bynum, J.*, for the value of some horses and mules, and for feeding and caring for them.

The following are the issues submitted to the jury, and responses thereto:

1. Did the plaintiff sell and deliver to the defendant the property mentioned in the complaint? Ans. Yes.

2. Did plaintiff furnish for the defendant the feed, stabling and attention stated in the complaint? Ans. Yes.

3 Did the plaintiff deliver to the defendant the property set forth in the complaint, as his agent, to be sold by him, and to account to plaintiff for amount of sale? Ans. ____.

4. Were the plaintiff and defendant to be partners in the sum realized from the sale to be made by defendant in excess of $2,155? Ans. ____.

Evidence was introduced on both sides, and defendant excepted to some introduced by plaintiff.

After verdict defendant's counsel moved for a new trial, and assigned for cause: Error in the Court in admitting improper testimony, and for allowing counsel to proceed in this line of argument after objection.

Motion overruled. There were no exceptions to the charge.

The Court gave judgment that the cause be referred to D. C. Mangum, to ascertain and report what part of the purchase-price is unpaid and the balance of the feed and attention to stock complained for, and report to a subsequent term. No exceptions were made to this judgment.

Mr. J. W. Graham, for plaintiff.
Mr. W. A. Guthrie, for defendant

MERRIMON, C. J.: Numerous issues raised by the pleadings were submitted to a jury and they rendered their verdict. The Court did not proceed to give judgment thereupon, or give any final judgment, but, deeming an account necessary, it made an order directing the Clerk to take and state such account. No exception was taken to this order by either party, but the defendant appealed from it to this Court.

The appellant mistakes the purpose and scope of this appeal when he supposes that it brings to this Court his exceptions taken on the trial in the Court below. It brings here for review only the interlocutory order appealed from, and, as to that, there was no exception or assignment of error. The Court gave no judgment upon the verdict, or any final judgment, and, therefore, the exceptions taken on the trial are not brought up; they can only reach this Court in the orderly course of procedure by an appeal from a final judgment. In the absence of exception to the order, if the appeal were properly taken at the present stage of the action, this Court could only affirm it.

But the appeal was prematurely taken. The order complained of was interlocutory—it did not put an end to the action, nor would the appellant be deprived of any substantial right, or be seriously prejudiced, by delaying his appeal until the final judgment. He might have excepted to the order and had his exception noted in the record, and a single appeal from the final judgment would bring up all his exceptions together. It is objected, that if this Court should sustain the exceptions in such case, the trouble and cost of taking the account would go for nought, and so it would, at the cost of the appellee. But such and like annoyances and inconveniences are part of the essential incidents that sometimes happen in the course of a litigation. They are more tolerable and less costly in time and money than to allow appeals from every interlocutory order of which a captious party might complain.

To establish the rule of procedure and practice whereby the taking accounts, and doing like and similar things, must be delayed in every action where the defendant denies and puts in issue the right of the plaintiff to recover otherwise than by some special plea in bar, would be to encourage and facilitate infinite delays, increase costs and multiply appeals indefinitely. After coming to this Court by a first appeal to settle and determine the principal right in controversy, the parties would, in a great majority of cases, go back in the action to take accounts and litigate incidental matters, and, in the course of doing so, appeal, and appeal, and appeal!! Generally, it is more orderly and logical, expeditious and cheaper, to bring the action on to its end, as nearly as may be, doing in the course of it all incidental things necessary and preparatory to the final judgment, and by one appeal bringing to this Court all the exceptions of a complaining party.

This Court has endeavored to so settle and establish the procedure and practice in actions as far as it has found it practicable to do so consistently with statutory provisions and well-settled general principles of law. Many cases decide that an appeal does not lie at once from an interlocutory judgment or order, unless it puts an end to the action, or may destroy or impair a substantial right of the complaining party to delay his appeal until the final judgment. He must assign error, or except, and have the same noted in the record and bring the whole up by an appeal from the final judgment. We cite numerous cases here for convenient reference, and there are others not cited to the same effect. *Sutton* v. *Schonwald*, 80 N. C., 20; *State* v. *McDowell*, 84 N. C., 798; *Lutz* v. *Cline*, 89 N. C., 186; *Jones* v. *Call*, *id.*, 188; *Arrington* v. *Arrington*, 91 N. C., 301; *State* v. *Polk*, 91 N. C., 652; *University* v. *Bank*, 92 N. C., 651; *Hailey* v. *Gray*, 93 N. C., 195; *Hicks* v. *Gooch*, *id.*, 112; *West* v. *Reynolds*, 94 N. C., 333; *White* v. *Utley*, *id.*, 511; *Knott* v. *Burwell*, 96 N. C., 272; *Spencer*, *ex parte*, 95 N. C., 271; *Clement* v. *Foster*, 99 N. C., 255; *Welch* v. *Kinsland*, 93 N. C., 281.

Appeal dismissed.

EATON PERRY v. C. A. YOUNG et al.

Conditional Sale—Caveat Emptor.

1. Before the Act of 1883, there was no law in this State requiring the registration of a Conditional Sale.
2. Where, under the law as it then stood, A sold a mule to B, and, in writing, retained title as security for the purchase-money unpaid, and then afterwards (but before the Act of 1883) allowed B to exchange his mule for a horse, under a verbal agreement that he should stand in the place of the mule: *Held*, (1) that both transactions were conditional sales, valid at that time without registration; (2) that subsequent innocent purchasers, for value, of the horse from B could not maintain title against A—the doctrine of *caveat emptor* applying.

CIVIL ACTION, tried at Fall Term, 1889, of NASH Superior Court, before *MacRae, J.*

Plaintiff appealed.

The case was heard upon exceptions to referee's report. In the complaint it is averred that plaintiff sold a mule to one Bullock, taking his note for the same, and reserving title until paid for; and, by consent of plaintiff, the mule was afterwards traded for a horse, upon the agreement that the title to same should be retained in like manner. No part of the note has been paid, and the defendant has seized the horse and converted him to his own use, and refused to pay the plaintiff. The horse is worth $150.

The defendant denies all the allegations of the complaint.

The case was referred to a referee, who found the following facts from the evidence adduced before him:

1. That plaintiff, on January 19, 1880, sold to one Allen Bullock, a certain mule, the title to said mule to remain in plaintiff till the payment of the purchase-money. A note under seal was given for the purchase-money, viz.: $120, due November 1, 1880, the retention of title being expressed in said note.

2. That no part of this note has been paid.

3. That said Allen Bullock, in August, 1882, by the consent of plaintiff, traded said mule with one Ben Dew for a certain blaze-faced horse, it being verbally agreed before and at the time of said trade between Allen Bullock and plaintiff that the said horse should stand in the place of the mule to secure payment of plaintiff's debt.

4. That said mule and said horse were left in possession of said Allen Bullock, and the horse was by him sold to defendants for a valuable consideration, and without notice of plaintiff's claim.

5. That defendants, after buying said horse from said Bullock, took possession of said horse, and appropriated him to their use, and refused to deliver same to plaintiff.

6. That said horse was worth $75 at the beginning of this action.

From these facts the referee finds the following conclusions of law:

1. That the agreement to substitute the horse for the mule to secure plaintiff's debt constituted a verbal mortgage of the horse, and the horse remaining in the possession of said Bullock, said mortgage is not good against defendants—innocent purchasers for value.

2. The plaintiff has no cause of action against defendants.

PLAINTIFF'S EXCEPTIONS.

The plaintiff excepts to the referee's report, filed herein at this term, on the following grounds:

1. The referee erred in his first conclusion of law. He ought to have held that the transaction there mentioned did not constitute a mortgage. The title to the horse passed to plaintiff, for whom Bullock then held him as bailee.

2 The referee erred in his second conclusion of law.

JUDGMENT.

This cause coming on to be heard upon the referee's report, and the plaintiff's exception to the same, it is ordered, adjudged and decreed that the two exceptions be each overruled (to which the plaintiff excepts); that said report be confirmed; that the defendants go without day, and that the plaintiff pay the costs of this action, to be taxed by the Clerk.

From the foregoing judgment the plaintiff appeals to the Supreme Court, assigning as error (1) the overruling of his first exception, and (2) the overruling of his second exception.

Mr. Jacob Battle, for plaintiff.

Mr. A. W. Haywood, for defendants.

105—30

SHEPHERD, J.: It was expressly agreed between the plaintiff and Bullock that the title to the mule should remain in the plaintiff until the payment of the purchase-money. Beyond all question, this constituted a conditional sale. *Frick* v. *Hilliard*, 95 N. C., 117, and the cases cited. Such a transaction stands upon the same basis as a bailment, and, apart from the Act of 1883 (*The Code*, § 1275), is valid, not only between the parties, but as against all the world, without registration. Possession is only presumptive evidence of ownership, and the principle *caveat emptor* applies to all who may deal with those in possession. A bailee may sell the property entrusted to him, but the purchaser thereby acquires no title against the true owner. *Clayton* v. *Hester*, 80 N. C., 279; *Butts* v. *Screws*, 95 N. C., 218; *Frick* v. *Hilliard*, *supra*.

Did the exchange of the mule for the horse vest the title to the latter in Bullock? We are unable to see how it could have that effect. The mule was in the possession of Bullock, as the plaintiff's bailee, and the trade was effected by the consent of the plaintiff, with the express understanding that the horse should stand *in the place* of the mule. This could have no other effect than to vest the title to the horse in the plaintiff, and the fact that the horse was to stand in the place of the mule, *to secure the payment of plaintiff's debt*, is perfectly consistent with a conditional sale, as in such cases the title is retained for that very purpose.

These transactions having occurred prior to the Act of 1883, requiring the registration of such conditional sales, the said act is not applicable. Its operation is prospective only. *Harrell* v. *Godwin*, 102 N. C., 330.

It must follow, therefore, that as Bullock was holding the horse under a conditional sale, and has paid no part of the purchase-money, the plaintiff is the owner and entitled to recover.

Error.

C. DOWD, Receiver, v. L. D. STEPHENSON.

Bank—President—Directors—Checks—Overdrafts—Private Debts of its Officers.

1. In an action by a receiver of a National bank to recover the amount of certain drafts and checks drawn by one S. on the bank, and paid by it during its existence: *Held*, that the then president's authorizing such transactions to pay debts due by himself, though with the knowledge of the cashier of the bank, is no sufficient defence.
2. The president and officers of the bank, other than the directors, have no authority to appropriate its moneys for the payment of private debts.
3. The defendant cannot be in the place of one who had made "overdrafts," for he had no deposit in the bank.

This was a CIVIL ACTION, tried at the Fall Term, 1889, of WAKE Superior Court, by *Armfield, J.*

The following is a copy of the material parts of the case settled on appeal:

The plaintiff sued the defendant for the sum of $273.42 and interest, claimed to be due for money paid out on defendant's written requests, or checks, by the State National Bank—in other words, an overdraft for that amount.

The plaintiff was the receiver of the bank.

The defendant admitted drawing the checks and the payment of the money by the bank to the amount of the draft, but denied any indebtedness to the bank, or to the receiver, upon the ground stated in the answer.

It was in evidence, without contradiction, and admitted by both parties, that C. E Cross was president and S. C. White was cashier of the State National Bank in 1887, and up to March 26th, 1888.

The defendant tendered an issue:

"To whom was credit given by the bank in the payment of the checks for the alleged overdraft?"

His Honor stated that the issue in this form involved an inference of law, and that the Court would decline to submit it. That the issue would be: "Is the defendant indebted to C. Dowd, receiver, and if so, in what amount?" and upon that issue the Court would charge upon the matters involved. Defendant excepted.

The defendant introduced the following testimony:

Charles E. Cross: "In 1887 and 1888, up to March 26, I was president of the State National Bank; S. C. White was cashier. I instructed White, the cashier, to pay the checks of defendant. I was indebted to defendant personally in a considerable amount for 'logging,' or supplying logs to my saw-mill. It had been my habit in settling with defendant to tell him to draw checks on the State Bank, and I would have them paid. I did this for my convenience. Defendant did so, and drew the checks constituting the overdraft claimed by plaintiff to be due. The checks were paid. Defendant's account had been overdrawn before, though he did not know it, and I had made it good. I told the cashier to look to me for the payment of these checks, and I also told Stephenson I would pay them. I was indebted at that time to the defendant more than the amount of the overdraft."

Cross-examined.—"My account was largely overdrawn at the time the checks were paid. I expected to receive some money, and to make a deposit to meet these checks. The directors were not consulted about this matter. They were not consulted usually in small loans, nor in ordinary cases about the payment of checks I did not wish to increase my own overdraft. I did not make a deposit to Stephenson's credit. It was my habit to make the deposits to his credit at the end of each month."

S. C. White, witness for defendant: "I was cashier for years prior to and in 1888. I controlled the cashing of checks. Defendant was in the habit of drawing checks on the bank. Cross, the president, told me to pay all of defendant's checks; that he was responsible for them and would pay them. I honored these checks on Cross' credit, and looked to him to pay them. Cross had paid former drafts. Mr. Womble, the book-keeper, knew of these transactions. No notice was sent to the defendant of his overdrafts. It was usual to send notices The checks were charged on the books of the bank to the defendant. No deposit was ever actually made by Cross to meet them."

L. D. Stephenson, the defendant: "I received no notice of any overdraft. Mr. Cross employed me to get logs for his mill, and I had instructed him to place what he owed me to my credit in the bank, and also $700 for land, and $1,000 for another tract of land, and I thought when I drew those drafts that he (Cross) had placed money to my credit. I was never notified of an overdraft. Bank was closed Saturday, March 26, 1888. The book keeper was instructed to notify all persons who had overdrawn. I had dealt in same way with Mr. Cross to the amount of $5,000. I did not know of the insolvency of the bank, or Cross, or of Cross' indebtedness to the bank."

Upon the evidence of the defendant, his Honor instructed the jury that the plaintiff was entitled to recover. Verdict and judgment as set forth in the record. The defendant excepted to the charge. From the judgment the defendant appealed.

The material part of the defendant's answer is as follows:

Defence set forth in answer—

2. He admits giving checks on said bank for the amounts set out in the complaint, but denies that he owes anything on that account, and avers the facts connected therewith to be as follows: C. E. Cross, president of said bank, being indebted to this defendant, requested him to give checks on said bank to the amount of his claim, and that the bank would pay the same. This defendant had, prior to this, dealt in a similar way with C. E. Cross, president of said

bank, to the amount of many hundred dollars, and the bank paid the checks of this defendant without his putting any money to his credit.

3. Not only the president, but the other officers of said bank, knew, when they paid the checks set out in the complaint, that the money was paid on account of the indebtedness of C. E. Cross, president of said bank, to this defendant, and was not intended to be charged to this defendant, the same being paid by said bank on the account of C. E. Cross, president of said bank, and intended to be a charge against him only.

4. The president of said bank was, at the time said checks were drawn and paid, indebted to this defendant to an amount much in excess of the checks drawn as above, which said bank agreed to pay, and is claimed as an offset to plaintiff's demand.

The Court gave judgment as follows:

"Hereupon it is adjudged that the plaintiff recover against the defendant the sum of two hundred and seventy-three dollars and forty-two cents, with interest on $273.42 thereof from the 13th day of March, 1888, until paid, together with costs and disbursements."

Mr. C. M. Busbee, for plaintiff.

Messrs. W. H. Pace and *J. N. Holding*, for defendant.

MERRIMON, C. J.—after stating the case: The issue tendered by the defendant did not embrace the whole matter of fact at issue—that submitted by the Court did, and was sufficient.

In the absence of special authority for such purpose, neither its president nor its cashier, nor these officers acting conjointly, had authority or right to appropriate and devote any part of the funds of the bank of which the plaintiff is receiver, to the payment of such president's personal debt due to the defendant. Such authority, ordinarily, was beyond the scope of the purpose and duties of such officers. No doubt the directors—the governing authority of the bank—might allow them to exercise such power, or they might ratify such transaction, but it must in some way sufficiently appear that they did. Gt. on Bk., § 143, *et seq.; id.*, § 171, *et seq.*

The defendant had no deposit in the bank, nor did it owe him anything, nor was it in any way bound to recognize and pay his checks or orders on it for money. It did, however, pay them, to his use and benefit. He thus obtained money from it by the unauthorized and fraudulent acts of its officers. Cross had no right or authority to tell the defendant that the bank would pay his checks. This the defendant ought to have known. It was his duty to himself and to the bank to see that such permission to draw upon it was authorized.

It was his misfortune that he dealt with and confided in its faithless officer, and not with and in it. The mere fact that he had drawn checks that had been paid before, under like circumstances, was no excuse or justification for drawing those in question, certainly in the absence of knowledge of such transactions on the part of the directors of the bank. If the latter connived at, or, by implication, or otherwise, sanctioned such payment of the checks of the defendant, he should have proven the fact.

The checks were not properly "overdrafts"—the defendant did not have any deposit or credit upon which to overdraw. He got and had benefit of the bank's money in a way not authorized or intended by it, and very certainly it can recover that money, by proper action, as the present one is. Morse on Banking, § 360; Bolles on Bk. and Dep., 358; *Franklin Bank* v. *Byram*, 39 Me., 489.

Affirmed.

JOHN RAY, JR., v. DAVID STEWART.

Grants—Great Seal of State—Registration—The Code.

The certificate of the Clerk of the Court, required by *The Code* as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a *grant*; the great seal of the State is sufficient authority for such registration.

This was an ACTION for the possession of land, tried at the November Term, 1889, of the Superior Court of HARNETT County, before *Armfield, J.*

The complaint was in the usual form. The answer was a general denial of its allegations.

"As evidence of his title, the plaintiff offered a grant in usual form for the *locus in quo* from the State to Jacob Holder, under whom the plaintiff claims, dated 28th December, 1852. Said grant was registered in Register's office of Harnett County in 1856, in which county the land lies, without probate, but simply on the exhibition of the grant to the Register. The defendant objected to its introduction as evidence, for the reason that its execution was not proven, and it had not been probated, and its registration had not been directed by any Court or officer. Its introduction was permitted, and the defendant excepted. The plaintiff's recovery depended upon the validity of said grant, and the use of it in evidence.

"There was judgment for the plaintiff. Motion for new trial overruled. Appeal to the Supreme Court."

Mr. R. P. Buxton, for plaintiff.

Messrs. W. E. Murchison, F. P. Jones and *D. H. McLean*, for defendant.

AVERY, J.—after stating the facts: *The Code*, §§ 2779 and 3328, provides that grants shall be authenticated by affixing to them the seal of State, while under section 2781, if the Secretary of State shall certify that a grant was fairly obtained, the seal of State may be again attached to it, by order of the Governor, when that originally annexed has been destroyed.

Authentication of a writing, in its ordinary legal meaning, is attaching to it some certificate or evidence of its genuineness, that will make it admissible in evidence, as being what it purports to be, without proof by witnesses Bouvier Law Dic.; Burrill L. Dic. At common law, public documents or records that could not be removed, might be authenticated in one of two modes—either by certificate of the officer having the custody of the record or document, or by an exemplified copy attested by the great seal of State. 1 Greenleaf Ev., §§ 501 to 507. Our Courts take judicial notice of the great seals of all governments that are recognized by our own government, and admit, as genuine, copies of foreign records or laws authenticated by them. *U. S.* v. *Amedy*, 11 Wheaton, 392; *U. S.* v. *Johns*, 4 Dall., 412; *State* v. *Carr*, 5 N. H., 367. So that, under the principles of the common law, in the absence of any statutory requirements, an original grant, or copy from the office of the Secretary of State, verified by the great seal of the State, would have borne internal evidence of genuineness sufficient to satisfy any Court in this or any other State of the Union. *Clarke* v. *Diggs*, 6 Ired., 159; *Candler* v. *Langsford*, 4 Dev. & Bat., 18.

But *The Code* (§ 2779) requires that all grants shall be registered, in the county where the land lies, within two years after they shall be issued, and allows any person interested to cause a certified copy from the Secretary of State to be registered in such county, with the same effect as if it had been the original. The time was extended by successive Legislatures, so that the limit of two years for recording them does not affect this case.

The defendant contends that, though the registry on a duly certified copy of the record of any deed or other instrument required or allowed to be registered, may, under the provisions of *The Code*, § 1251, be given in evidence in any Court of the State, a copy of a grant is not properly proven and is not such a document as the law allows to be recorded by the Register of Deeds, until the Clerk of the Superior Court of the county where the land lies shall adjudge the certificate to be in due form, admit it to probate and order it to be registered in accordance with the provisions of *The Code*, § 1246, and that, not being duly registered, a copy is not "good and available in law," under the construction given to *The Code*, § 1245, as assumed by ch. 147, Laws of 1885.

We do not think that our statutes are fairly susceptible of the interpretation that the Clerk of the Superior Court of a county, whose seal cannot be recognized beyond the limits of the State, must adjudge that the patent of the sovereign State, attested in the manner prescribed by law, is certified in due form, and order it to be registered, before the Register can be satisfied of its genuineness and enter it in his record of deeds. When we analyse § 1246 of *The Code*, with its ten sub-sections, it becomes very apparent that it was not intended to apply to grants. The State of North Carolina, being the grantor, "does not reside in any county in the State, nor outside of the State, but within the United States, nor outside of the United States," and, therefore, a grant cannot be admitted to probate under the mode of proving prescribed in either of the first four sections. Sub-sections five and six relate to cases where one of the grantors is a *feme covert;* sub-section seven prescribes a form of certificate, while the remaining three point out the manner of proving instruments where the maker, or witnesses, or both, are dead, or non-residents of the State. Section 2, ch. 147, Laws of 1885, provides, "that all deeds, contracts or leases, before registration, except those mentioned in § 2 hereof, shall be acknowledged by the grantor, lessor, or the person executing the same, or their signatures proven on oath by one or more witnesses in the manner prescribed by law, and all deeds so executed shall be valid and pass title and estates without livery of seizin, attornment, or other ceremony whatever." If grants from the State are comprehended under the general description of "deeds, contracts or leases" (which we are not prepared to admit), the requirement that the proof should be made by acknowledgment of the grantor, or on oath by one or more witnesses, cannot be construed to confer on Clerks of the Superior Court the power to pass upon a patent, signed by the Governor, counter-signed by the Secretary of State, and authenticated by the great seal of State, and declare that it is, or is not, in due form for registration. As the sovereignty of the State is in its citizens, and its officers are not authorized by law to make any acknowledgment other than that embodied in the grant itself, and as the form of grant is prescribed in §2779 of *The Code*, without witnesses, it is as clearly impossible to subject them practically to the stringent provisions of the Act of 1885 as to find a clause or sub-section of §1246 of *The Code* applicable to them.

We think, therefore, that there is no statutory requirements that further authentication than the affixing of the great seal of State to a grant, in the form prescribed by statute, must be made to authorize a Register of Deeds to enter it on his records, and we would hesitate to construe our laws as inaugurating a change so radical, if not unreasonable.

Affirmed.

CLEMENT DOWD et al. v. C. T. WATSON.

Presumption of Death—Hearsay Evidence—Seven Years.

1. The presumption of death arises from the absence of a person for seven years without being heard from.
2. It is error to exclude from the jury, in an issue upon the death of a person, evidence of *information* that he was alive, merely because it is *hearsay* testimony.

This was a CIVIL ACTION, tried at the February Term, 1890, of CRAVEN Superior Court, before *Boykin, J.*

The facts are sufficiently stated in opinion.

Messrs. H. R. Bryan (by brief) and *W. W. Clark*, for plaintiffs.

Mr. C. Manly, for defendant.

CLARK, J.: There was no direct proof of death, and plaintiffs relied upon the presumption of death from absence for more than seven years without being heard from. This is merely a presumption of fact, and may be rebutted. If any one had heard from the party whose death is alleged within seven years, the jury should have been allowed to consider evidence of that fact. "There is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree." *Flinn* v. *Coffin*, 12 Allen. 133; Abb. Tr. Evidence, 76. In *Moore* v. *Parker*, 12 Ired., 123, it was held that a report that a person who had been absent seven years was alive, which report, on investigation, proved to be unfounded, would not rebut the presumption of death. The decision is based not on the ground that the report was incompetent, but that diligent inquiry had been made and showed it to be untrue.

The case on appeal states:

"For the purpose of rebutting the presumption of death of E. M. Andrews, the defendant offered evidence to the effect that E. M. Andrews was a single man; that he had no near relation in Craven County, or in North Carolina, except his aforesaid brother; that, in 1867 or 1868, he joined the United States Army and left the county with his command. Defendant and one Israel Simmons became witnesses. Defendant proposed to prove by them 'that the general report among his friends and those who knew him before he left home was that E. M. Andrews was living and in the United States Army.' Defendant also proposed to prove by said Simmons that he had, a short time since, seen and conversed with a man from Texas, and that he was informed by him that E. M. Andrews was alive, in Texas; that he had seen him there a short time before.

"The Court held that there was not sufficient rebutting testimony to be submitted to the jury, and instructed the jury to respond to the issue affirmatively if they believed the evidence.

"The Court excluded the testimony above offered. To such exclusion, and to the instruction of the Court to return a verdict in favor of the plaintiffs, the defendant excepted."

We think the Court erred. The presumption of death arises from the absence of a person for seven years without having been *heard from*. To rebut the presumption, it is not necessary to produce the testimony of persons who have seen him, or to produce letters from him. It is sufficient to produce evidence which shall satisfy the jury that he has been *heard from* within the seven years. Such evidence is usually and almost necessarily "hearsay." It may be that, if the evidence here offered had been admitted, the cross-examination would have shown it to have been mere vague rumor, and if so, unworthy of credit; but if there was such report and intelligence as to the absent man among his friends and former acquaintances, as was offered to be shown, the weight to be given it was for the jury.

Error.

J. T. GAY v. WILLIAM GRANT, Administrator.

Rehearing Appeals—Administration.

1. When this Court, in its application of the law to the facts of a case, omits to consider material facts, and the interests of parties are thereby affected, a petition to rehear will be granted, and, in so far, the former opinion will be modified and judgment reformed.
2. An administrator ought not to be charged with doubtful notes and accounts in the absence of anything to show they could have been collected, especially when they appeared to be under the control of some of the plaintiffs.

This was a Petition to Rehear *Gay* v. *Grant*, heard at the October Term, 1888, of the SUPREME COURT, and reported in Vol. 101 N. C., p. 206.

R. B. Peebles, for plaintiffs.
T. N. Hill, for defendants.

DAVIS, J.: This is a petition of the plaintiffs, other than L. D. Gay and wife, and R. H. Stancill, to have the defendant's appeal (101 N. C., 206) reheard. The application to rehear is granted, so far as it relates to the personal property and the errors assigned, in regard to the exoneration of the defendants from the payment of certain bonds or notes mentioned in the petition, and hereinafter specified.

Upon a careful review of the record, we are satisfied that there was error, not in the law stated as applicable to the case, but in including within the rule laid down items of account, with reference to which there was evidence to be considered, other than the mere facts that they were contained in the inventory filed by the administrator, and were not produced, nor their absence accounted for, at the trial, by the defendants, who are the administrators of the sureties to the bond of the administrators of Green Stancill (who are not defendants, but plaintiffs, in this action).

The original record makes a large volume, and only so much of it as was deemed material was printed, and the argument of counsel and the attention of the Court were especially directed to the printed record; and in classifying and grouping the large number of exceptions and considering together such as rested upon the same or similar grounds, the Court was not advertent to some material facts which appeared in the written, and not in the printed, record.

Upon an examination of the evidence in the written record, which contains the inventory, also the long exhibits, it will be seen that the Court erred, in fact, in supposing that the items mentioned therein were included in the long list of claims reported as "bonds due the estate of Green Stancill, deceased, not collected, the parties being insolvent." It will be found, upon an examination of the accounts rendered by the administrators themselves, as contained in these exhibits, that not only were these items not embraced in the list reported as insolvent and not collected, but the claims against Britton Edwards, A. R. Deloatch and Jesse Deloatch, Israel Parker and J. Smith, R. Moore and T. H. Long were collected; and it also appears that considerable sums were collected by the administrators of Wiley Edwards, N. Pruden, Jethro Taylor, W. P. Vick, E. C. Davis, and J. B. Pruden. There was also evidence before the referee as to the condition of the other debtors, to be considered by him, other than the inventory and non-production of the bonds, except as to the items numbered sixty and sixty-one. As to these, the finding of fact was: "Has been insolvent since the administrators qualified; bond inventoried without any designation; bond has not been produced, nor its absence accounted for." We do not find any evidence with regard to these items (Nos. 60 and 61) to take them out of the opinion that, "under the circumstances of the case before us, it would be unjust to apply this rule (the general rule that would devolve upon the administrator and his sureties the burden of showing that the bonds could not have been, by due dilligence, collected) to the defendants, who are the administrators of the sureties on the administration bond, and though the estates of their intestates are liable for any default of the principal obligors, they ought not, in a case like this, to have thrown upon them the burden of accounting for the absence of bonds, which have been, or ought to have been, under the control of one of the plaintiffs and of the intestate of another," and it being found as a fact that the maker of the bonds has been insolvent ever since the administrators qualified, the defendants ought not to be charged with them, in the absence of anything to show that they were, or might have been, collected.

The former opinion will be reversed, so far as it relates to the defendants' exceptions to the ruling of the Court below, charging them with the following bonds: No. 49, Britton Edwards, $99.18; No 50, A. R. Deloatch, $24.65; No. 51, A. R. and Jesse Deloatch, $249.73; No. 52, T. H. Long and W. J. Moody, $119.70; No. 62, N. Pruden and H. Pruden, $97.16; No. 63, Green Gay *et al.*, $200; No. 64, J. Parker and J. Smith, $150; No. 65, Jethro Taylor, $27.07; No. 66, Riddick Pope, $4.37; No. 67, W. H. Faison, $534.15; No. 68, Wiley Edwards and Sarah Edwards, $344.91; No. 69, W. P. Vick, $381.44; No. 71, Richard Moore, $5 41; No. 72, J. B. Pruden and R. Pope, $67.86; No. 86, John T. Branch and B. W. Goodwin, $535.43; No. 98, E. C. Davis, $14.53; No. 102, N. Pruden, $31.86; No. 103, E. C. Davis, $10.12; No. 104, E. C. Davis, $80.27; No. 105, E. C. Davis, $67.23.

The foregoing items, with interest added, will be retained in the account as originally reported by the referee, and the defendants charged with them. John T. Branch (No. 86) is not to be mistaken for James F. Branch (No. 89), written "J. T. Branch" on page 214 of the case reported in 101

N. C. The original opinion will be reformed in the particulars specified in this.

Petition granted, and former opinion reformed.

In the same case, upon petition before Supreme Court to rehear the plaintiff's appeal—

MERRIMON, C. J.: This is an application to rehear the plaintiffs' appeal in *Gay* v. *Grant*, 101 N. C., 218, decided at September Term, 1888. That appeal was well and elaborately argued on both sides. The Court clearly understood and comprehended the assignments of error, and gave them much careful and patient consideration. It examined with scrutiny the statutes and authorities cited on the argument, and others not so cited. It does not at all appear that any material matter, point or authority was overlooked by inadvertence or otherwise. No direct authority has been brought to the attention of the Court that it failed to see and consider. There has simply been a re argument. The case was fully heard and considered in all respects. So that, substantially, in view of the very same considerations, authorities and arguments, the Court is called upon to reverse its decision, made with care and deliberation. It is well settled, upon reason and authority, that it will not, and ought not, to do so. *Watson* v. *Dodd*, 72 N. C., 240; *Haywood* v. *Daves*, 81 N. C., 8; *Devereux* v. *Devereux*, *ibid*, 12; *Lewis* v. *Rountree*, *ibid*, 20; *Lockhart* v. *Bell*, 90 N. C., 499; *Hannon* v. *Grizzard*, 99 N. C., 161. For the reasons stated in the opinion of the Court in the appeal mentioned and referred to, and others that might, but need not, be stated here, the judgment therein must remain undisturbed.

The petition, as to that appeal, must be dismissed. It is so ordered.

AMOS HAYS et al. v. H. C. DAVIS et al.

Will, Construction of—Partition.

Where a testator devised certain real estate to his wife for life or widowhood, and, after her death, to his three daughters, naming them, "as long as they wish to keep house together," providing for sale and division among "his children and their heirs," if they (his daughters) "should marry or wish to quit keeping house," and one of the daughters, the others being dead, was still keeping house on the land: *Held*, the land was not subject, during her life, to partition among the heirs.

This was a CIVIL ACTION, tried before *Armfield, J.*, at the September Term, 1889, of WILSON Superior Court.

There was a petition to sell lands, and the cause was referred to find the facts, which are, that Elisha Davis died in 1865, leaving a last will and testament, by which the land in controversy was devised to his widow for life or widowhood, and she remained in possession to her death in 1887. The devisees, who took after the death of their mother, were Polly, Sarah and Elizabeth, the last of whom died before the widow (her mother). The other two continued to live together until the death of Polly in 1888, who devised to plaintiffs. Sarah is still unmarried, and lives and "keeps house" on the land, and has done so since the death of her sisters.

The material parts of the will are:

"*Item.*—I give and devise to my beloved wife all my tract of land whereon I now live, during her natural life-time or widowhood. * * * And if they should remain single until the death of their mother, and wish to continue to keep house together, it is my desire that the land and all the farming tools may remain with them as long as they may wish to keep house together; and if they should marry, or when they wish to quit keeping house, it is my request that the land, and all the property that I have not given away in legacies, may be sold and equally divided between all my children and their heirs forever."

Messrs. W. C. Munroe and *S. A. Woodard* (by brief), for plaintiff.

Messrs. W. R. Allen, *C. B. Aycock* and *F. A. Woodard* (by brief), for defendant.

CLARK, J.: The evident intent of the testator was to provide a home for his wife during her life or widowhood, and then a home for his single daughters, as long as they should remain unmarried and wish to keep house at the old homestead. The will provides that, after the death of the mother, "if they (the daughters) should marry, or when they wish to quit keeping house," the land shall be sold, &c. It is found as a fact that Sarah Davis, one of the daughters, the other two being dead, is unmarried, has continued to live on the land and keep house there up to this time and does not wish to "quit keeping house." The contingency, upon the happening of which the testator directed the land to be sold, has not occurred. The petition, therefore, was premature, and must be dismissed. The Court will not pass upon the abstract rights of the parties to share in the division. When the contingency happens upon which the sale for partition is to be ordered, the parties entitled may be different from what they are now, and will have a right to be heard for themselves, or they may prefer to settle the matter otherwise than by litigation.

The judgment dismissing petition at petitioners' cost is

Affirmed.

W. P. TAYLOR et al. v. THE ALBEMARLE STEAM NAVIGATION COMPANY.

Contract—Easement—License—The Code—Registration—Ratification—Corporation—Evidence.

1. A contract whereby one *grants* to a company the right for ten years to land and to receive all freights for a certain town amounts to more than a license.
2. Taking this to be a mere right-of-way, it falls within the statute allowing registration (*The Code*, §1264), in that it purports to convey an "interest in or concerning land."
3. Evidence that one is *acting* as president of a company is competent to show he *was* president.
4. A contract signed by an authorized agent may be ratified by the company, and for this purpose its acts are sufficient.
5. As there was nothing in the contract to forbid *plaintiff* having another wharf, evidence of this was inadmissible.
6. The question of rejecting a letter offered in evidence is not reviewable in this Court unless the contents of the letter are sent up with the record.

This was a CIVIL ACTION, tried at Fall Term, 1889, of HERTFORD Superior Court, before *Brown, J.*

The defendant company, through its treasurer, John T. Hill, on April 13th, 1875, entered into a contract with W. P. Taylor and A. J. Northcott, the material parts of which are hereinafter set out. The same was also afterwards ratified by the company. Plaintiff afterwards became the assignee of Northcott's interest. In 1884, defendant caused a new wharf (Anderson's) to be erected about three hundred yards below the one described in the contract, and offered inducements for shipments from it, and caused their steamers to stop there, by which plaintiff claimed that the contract was broken.

The plaintiff covenanted and agreed, for himself, his executors, administrators and assigns, "for and in consideration of two hundred dollars per annum, to give to the party of the second part the right to land all freight for Winton on the wharf now belonging to the parties of the first part, and known as the "Northcott" wharf, situated on the Chowan River at Winton, North Carolina, and the exclusive right to receive any freight which the party of the second part may be willing to carry for a term of years hereinafter specified; and the party of the second part covenant and agree to cause all boats owned and run by the aforesaid company on the Chowan River to land and receive all freights to be landed or received at Winton at the aforesaid wharf," &c.

In consideration of the above contract, J. T. Hill, treasurer, covenanted and agreed, under seal, for himself and his company, to cause the company's boats to land at this wharf, and that the agreement should remain in force for ten years from April 1st, 1875. This contract was duly registered in the office of Register of Deeds for Hertford County.

Defendant objected to the introduction of the registration book to prove the contract. The objection was overruled. Defendant excepted.

The jury found that plaintiff did and the defendant did not comply with the terms of the contract, and fixed plaintiff's damages at $666.25

The Court gave judgment accordingly, and defendant appealed.

Defendant asked the Court to charge, in substance—

1 Agent cannot bind his principal by contract under seal, unless the principal gave him authority under seal.

2. Agent's authority and acts cannot be proved by his own declarations.

3. Where agent's company is a corporation, his authorized acts cannot, or will not, be binding until ratified by a board of directors, upon full disclosure of all the facts and circumstances.

4. The burden is upon plaintiff to show that the contract has been ratified and he has performed his part.

5. If plaintiff erected and leased an opposition warehouse, where defendant lost freight, he is not entitled to recover.

6. If defendant landed and shipped all freights actually received and offered at plaintiff's wharf, he cannot complain.

7. Contract only applied to the freights shipped to and from the town of Winton.

8. Defendant did not violate contract by shipping to and from Anderson wharf.

9. The plaintiff is not entitled to recover on the evidence in the case, if you believe it all.

10. That if the plaintiff, by his acts and conduct, prevents the defendant company from receiving at said wharf any freight which it was willing to carry there, the plaintiff has violated his said contract, and cannot recover.

Defendant objected to the introduction of evidence showing that J. T. Hill, treasurer, was also acting as superintendent of the company.

Objection overruled. Defendant excepted.

Defendant offered to prove that, after date of contract, plaintiff built and leased another wharf to a rival line of steamboats.

Defendant objected. Objection overruled. Defendant excepted.

Defendant offered in evidence a letter signed by plaintiff, which was rejected by the Court. Defendant's exception was overruled.

The Court charged the jury, in substance, as follows:

Upon the first issue, this contract, so far as the evidence discloses, was not executed by the defendant at date thereof, there being no evidence that Hill, as treasurer, was authorized to sign and execute it. Its validity depends upon its ratification and acceptance by defendant. If the defendant accepted it, acted under it, and performed its terms, up to November 1, 1884, with full knowledge of its import, then it is a ratification, and the jury should answer the first issue Yes.

As to second issue, this contract requires defendant to cause all its boats on the Chowan to land and receive all freights for the town of Winton at plaintiff's wharf, in order that plaintiff might get the benefit of the agreement and receive wharfage.

There is nothing in the contract which prohibits the defendant from landing its vessels at a wharf outside the town of Winton, and nothing which would prevent defendant from landing or receiving such freights as were tendered at such wharf by the voluntary act of the shipper; and if defendant, fairly and in good faith, did no more than this, that would not be a violation of its ageement, and you should answer the second issue Yes.

But if defendant, while undertaking to perform its agreement with plaintiff, by stopping its vessels at plaintiff's wharf, had the Anderson wharf built, and solicited and procured the merchants and shippers of Winton to deliver freights there instead of, as before, at plaintiff's wharf, and if its purpose in establishing the Anderson wharf was solely to draw freight from plaintiff's wharf, as testified to by Superintendent Bogart, and thus, by defendant's efforts, such freights and business were withdrawn from plaintiff's wharf before the expiration of the agreement, by the instigation of the defendant's agent, it would be a violation of the agreement, and the defendant would not have performed its contract, and you should answer the second issue No.

Mr. W. D. Pruden, for plaintiff.

Messrs. Winborne & Bro. (by brief), for defendant.

SHEPHERD, J.: 1. The defendant objected to the introduction of the registry of the paper-writing, because it was not such an instrument as is required and allowed to be registered. It is contended that, at most, it was but "a license or easement to deposit and receive freights on the wharf" of the plaintiff.

We are of the opinion that the writing is within *The Code*, § 1264, in that it purports to convey an "interest in or concerning land." It amounts to more than a mere license, for it *grants* to the defendant a right to land all freights for Winton on the plaintiffs' wharf for the period of ten years, and confers an exclusive right to receive any freight on said wharf which the defendant may be willing to transport. Taking this to be the grant of a mere right-of-way, it falls within the words of the statute, for a right-of-way is an incorporeal hereditament, "which is a right issuing out of a thing corporate (whether real or personal), or *concerning*, or annexed to, or exercisable within the same." 2 Blackstone, 21.

2. The objection to the testimony of W. P. Taylor that J. T. Hill, who executed the writing, was at that time acting as the superintendent of the defendant company, is without merit.

It was competent to show this fact, and, even if it were not admissible, the defendant could not have been prejudiced, as his Honor expressly told the jury that there was no testimony tending to show that Hill was authorized to execute the writing, and that its validity depended upon its ratification by the defendant.

3. The defendant offered to prove that the plaintiff built and leased another wharf to an opposition line.

This was very properly rejected, as there is nothing in the contract which prevented the plaintiff from so doing. We will add that the instructions of the Court upon this alleged breach of contract on the part of the plaintiff were fully as liberal as the defendant was entitled to.

4. The defendant offered in evidence a letter signed by one of the plaintiffs. It was rejected by the Court, and the defendant excepted. No such letter appears in the record, and as it was the duty of the appellant to have had it brought up, and, we are ignorant of its contents, the exception must be overruled.

5. The first, second, third and fourth prayers for instruction were substantially given by the Court. It was not necessary to show a formal ratification of the contract by the Board of Directors. It was sufficient, as the Court charged, if the defendant "accepted it, acted under it, and performed its terms * * * with full knowledge of its import." This instruction was clearly sustained by the testimony of J. H. Bogart, the superintendent of the defendant, who stated that the defendant "had used the plaintiff's wharf since the date of the agreement, and acted under it."

6. The sixth, seventh, eighth and ninth prayers for instruction are founded upon an erroneous construction of the contract. The defendant agreed that it would land all of its boats touching at Winton at the plaintiff's wharf, in consideration of the exclusive privileges granted, and the plaintiff was to receive a certain rate of wharfage on all of the freight landed and received for shipment. It is very clear, that if the defendant erected another wharf near the town of Winton, for the sole purpose of "drawing freight from the plaintiff's wharf, as testified to by Superintendent Bogart, and thus, by defendant's efforts, such freights and business were withdrawn from the plaintiff's wharf before the expiration of the agreement, by the instigation of the defendant's agents, it would be a violation of the agreement." Such was the charge of the Court upon this question, and we think that it was a correct interpretation of the contract. Upon a perusal of the whole charge, we are unable to discover any error of which the defendant can justly complain.

7. The third assignment of error in the charge is too general, and cannot be considered by this Court. *McKinnon* v. *Morrison*, 104 N. C.

Affirmed.

A. J. BOST v. L. C. LASSITER et al.

Injunction—Lien—Action to Enforce—Judgment Creditor.

In April, 1886, the plaintiff recovered and had docketed a judgment against P., who, prior to that date, had entered into a contract with S. for the purchase of certain lands, and had paid a portion of the purchase-money. In 1889, S., without the knowledge of plaintiff, recovered judgment against P. for balance of purchase-money, and a decree to sell the land if the judgment was not paid by a certain day, and was proceeding to sell the land under the decree when the plaintiff brought an action to declare and enforce his lien, and for an injunction against sale pending that suit: *Held*—

1. That the plaintiff's action was properly brought, and that he could not have asserted his equity in the action between S. and P.
2. That, under the circumstances, an injunction to the hearing was proper, particularly as the complaint alleged, and there was some evidence to prove, that the judgment for the balance of the purchase-money was collusive.
3. That the fact that plaintiff's debt had other securities, did not prevent him from asserting his lien on the land.

This was a civil action, pending in Cabarrus County, heard upon application for injunction, before *Shipp, J.*, at Chambers, February 18, 1890.

The plaintiff alleges, in substance, that since April, 1886, he has had a docketed judgment in the Superior Court of the county of Cabarrus, against the defendant C. A. Pitts and two other persons, his sureties therein for $1,500, interest and costs; that before that time, in 1874, Sally Pitts, the mother of the said C. A. Pitts, purchased two tracts of land, specified, situate in said county, at a judicial sale, and afterwards, a proper deed therefor was executed to her on the 26th of April, 1876; that the said C. A. Pitts paid the purchase-money for the said land, and, on the 27th of April, 1876, the said Sally executed to him a paper-writing in respect to and concerning the same, whereof the following is a copy:

"This writing witnesseth, that whereas, my son, Caleb A. Pitts, has advanced to me large sums of money to enable me to secure the lands whereon I now live, in Cabarrus County, N. C., and has, in fact, advanced and paid all the cash actually paid thereon; and whereas, my said son has also offered me a home and support with him during my life—

Now, therefore, in consideration of the premises and the sum of one dollar to me paid, I hereby bargain and sell, convey and confirm unto said Caleb A. Pitts, his heirs and assigns, all of my interest, right and title in and to said lands, consisting of two separate interests or tracts as bid off by me at the sale of the administrator of my deceased husband, Moses Pitts; and I hereby authorize the proper officer or person to make the deeds for said lands directly to said Caleb A. Pitts, on the payment of the balance of the purchase-money—

To have and to hold, with the appurtenances, to him, his heirs and assigns forever, and with all rights of action and of warranty, and to this deed I bind myself, my heirs and assigns. My hand and seal this the 27th day of April, 1876.

SALLY PITTS. [Seal.]

Test: JAMES LINKER."

The plaintiff further alleges:

"8. That on the 2d September, 1887, the said Sally Pitts caused a summons to be issued from the Superior Court of Cabarrus County in her favor, as plaintiff, and against the defendant C. A. Pitts, returnable at Fall Term, 1887, but that no complaint was filed until Spring Term, 1889, when a complaint was filed in the name of Mrs. L. C. Lassiter, executrix of Sally Pitts, deceased, L. C. Lassiter and Mary E. Pitts, plaintiffs, and against the defendant C. A. Pitts, alleging, in substance, that the said Gibson had executed the deed heretofore mentioned to the said Sally Pitts, and that, shortly after her purchase, said Sally Pitts contracted with her son, C. A. Pitts, to sell him the two tracts of land mentioned, and that said C. A. Pitts had paid all the purchase-money except the sum of eight hundred dollars, which sum, with interest at eight per cent. from March 1, 1887, was due from the said Pitts; that no deed had been executed by the said Sally to the said C. A. Pitts; that said Sally was dead, leaving a will which had been duly probated, appointing the said L. C. Lassiter executrix, and devising and bequeathing all her property and estate to the said L. C. Lassiter and Mary E. Pitts; that the said Lassiter and Mary E. Pitts elected to confirm the said contract."

"9. That at Fall Term, 1889, the said C. A. Pitts, being largely involved, from carelessness, inadvertence, or some other purpose, filed no answer, and judgment by default was rendered against him for the sum of $800, with eight per cent. interest from March 1, 1887, and, unless the said sum was paid in thirty days, that the said L. C. Lassiter advertise said tracts of land for four weeks, and sell the same to the highest bidder at public sale at the court-house door in Concord, for cash, and, out of the proceeds of sale, first pay the said judgment and costs, including reasonable attorneys' fees, and pay the surplus over to said C. A. Pitts.

"10. That this plaintiff had no knowledge or information of any such action or judgment until the land was advertised to be sold, or a few days prior to the advertisement.

"11. That either of said tracts of land is of sufficient value, as plaintiff is informed and believes, to satisfy the said debt of $800, and interest and costs, if any such is due.

"12. That this plaintiff had no knowledge or information that the said Sally Pitts had executed the said deed of April 26th, 1876, until a few days since.

"13. That the said L. C. Lassiter has advertised the said tracts of land for sale at the court-house door in Concord on Monday, the 3d day of February, 1890, for cash, and proposes to sell the same according to the provisions of the judgment of Fall Term, 1889.

"14. That, as stated above, the defendant C. A. Pitts has no property to pay plaintiff's judgment, and plaintiff insists that, under the deed of April 26th, 1876, the said C A. Pitts had such an interest in said lands as subjected the same to the lien of his judgment."

Wherefore, plaintiff demands—

"1. That the said judgment and decree rendered at Fall Term, 1889, in favor of L C. Lassiter, executrix of Mary E. Pitts, L. C. Lassiter and C. A. Pitts, in so far as it declares the judgment to be a lien on the lands mentioned, and orders and decrees the lands to be sold and the said judgment, costs and attorneys' fees to be satisfied out of the proceeds of said sale, may be annulled and cancelled, or stricken out.

"2. That said lands may be sold by the Clerk of this Court upon such terms as to the Court should seem meet and proper, and that the proceeds of sale be applied to the satisfaction of plaintiff's judgment and costs of this action, and the surplus, if any, be paid as the Court may direct.

"3. That the plaintiff's judgment be declared a lien on the interest or estate of the said C. A. Pitts in said lands.

"4. That the defendant L. C. Lassiter, her agents and attorneys, be restrained and enjoined from selling said land, or said Pitts' interest in said land, and for such other and further relief as the facts of the complaint may entitle him to, and for costs of action."

The complaint purports to have been filed at Spring Term, 1889, but it was not sworn to until September, 1889.

The defendants, except C. A. Pitts (who did not answer), admit the plaintiff's judgment, and as to the paper-writing, a copy of which is above set forth, from Sally Pitts to C. A. Pitts, they say and allege as follows:

"5. That, as they are informed and believe, the fifth paragraph of said complaint is untrue. And they specifically deny, as they are informed, advised and believe, that the written instrument, alleged to have been executed by Sally Pitts to C. A. Pitts on the 27th of April, 1876, is, or was ever intended to be, by Sally Pitts or C. A Pitts, more than a mere contract to convey under agreements and conditions hereinafter to be set forth, and omitted therefrom through their mutual mistake and ignorance."

And further answering the complaint herein, these defendants say:

"1. That, shortly after Sally Pitts purchased said two tracts of land, mentioned in paragraph six of the complaint, at said sale of G. L. Gibson, administrator, she contracted, orally, with C. A Pitts to sell to him said two tracts of land at twelve dollars and fifty cents per acre, she having purchased at said sale said 157-acre tract of land, encumbered with her dower, for five hundred and one dollars ($501), and the 90-acre tract at thirteen dollars ($13) per acre; that the execution, if made, of said written instrument of April 27th, 1876, to C. A. Pitts by Sally Pitts, was in conformity to said oral contract, and subject to it, as a condition precedent, omitted as stated above; that no part of said large amount of purchase-money due Sally Pitts, under said oral contract, has ever been paid, except such sums as C. A. Pitts may have paid of the purchase-money, due on said lands to G.

L. Gibson, administrator, by Sally Pitts, which sums were less than her bids at said sale of Gibson, administrator, to the actual knowledge of these defendants, by five hundred and seventy-five dollars ($575), which Sally Pitts really paid herself to George L. Gibson, administrator, by paying it to said administrator's attorney, Paul B. Means, who received and receipted for the same on the two notes given by Sally Pitts to G. L. Gibson, administrator, under her bids at said sale for said lands.

"2. That, as these defendants are informed and believe, this action was begun by agreement between this plaintiff and C. A. Pitts, not really for the purpose stated in said complaint, but to hinder and delay these defendants in their just rights, and force them to a further compromise, or to defraud them entirely therein."

They admit that the defendants, other than C. A. Pitts, brought their action and obtained judgment against him as alleged by the plaintiffs, but they deny that it was obtained by collusion with the defendant therein. They allege that it was obtained fairly—that the defendant therein well understood the nature and grounds of the claim against him, &c.

The plaintiff moved at Chambers for an injunction pending action until the hearing upon the merits. The Judge heard the motion upon the sworn complaint, answer, and exhibits, and gave judgment as follows:

"I find, from the pleadings filed, that the plaintiff has a judgment as stated in his complaint, and that Sally Pitts, testatrix, &c., executed the paper-writing set forth in the complaint; that the defendant C. A. Pitts, the same being admitted in the answer, has paid a part of the purchase-money, &c.; that the plaintiff's judgment makes a lien upon his interests, legal or equitable, whatever it may be. It is therefore considered that the restraining order heretofore granted, operating as an injunction, be continued until the hearing. It being considered that the bond heretofore given operate and continue as an injunction bond, for all purposes."

The defendants having excepted, appealed to this Court.

Mr. W. J. Montgomery, for plaintiff.
Mr. P. B. Means, for defendants.

MERRIMON, C. J.: The counsel of the appellants, relying on *Long* v. *Jarratt*, 94 N. C., 445, and other like cases, contended earnestly on the argument that the plaintiff should have sought the relief he seeks by this action by a motion, or petition, in the action mentioned, and particularly referred to in the complaint, wherein the present defendants, except C. A. Pitts, were plaintiffs, and he was defendant, because, as he contends, that action is not yet ended, and the subject-matter of the present action was pertinent to, and embraced by, the former. This contention is unfounded.

The purpose of the action referred to was simply to obtain judgment for a balance of the purchase-money of the land, and to sell the latter, if need be, to satisfy the judgment. It was no part of its purpose to settle and adjudicate the rights of third parties who may have had liens like that claimed by the plaintiff, because such liens were not necessarily part of, or incident to, the cause of action, nor was it necessary to pass upon and conclude them in settling and administering the rights of the parties then before the Court.

The purpose of the present action, as we shall presently see, is entirely different and distinct from that of the one referred to. Moreover, the judgment in the latter action was a final one. The matter in litigation—the cause of action—was settled, determined, by it. Nothing remained to be done but to enforce the judgment, and only motions and proceedings for that purpose were pertinent and could be entertained, except motions to set the judgment aside for irregularity, or because of "mistake, inadvertence, surprise or excusable neglect," as allowed by the statute (*The Code*, § 274); *Smith* v. *Fort* and *McLaurin* v. *McLaurin*, decided at the present term, and cases there cited.

The purpose of this action is to enforce the alleged lien of the plaintiff's judgment upon the interest of the defendant C. A. Pitts, in the land mentioned, which he cannot enforce by ordinary process of execution, because there is some balance of the purchase money of the land yet unpaid. In such case, the party having the lien is put to his action to enforce it. This is done by ascertaining the balance of the purchase-money, selling the land under the order of the Court, if need be, and applying the proceeds of the sale first to the payment of such balance, and then the surplus, or so much thereof as may be necessary, to the discharge of the creditor's lien and debt. *Trimble* v. *Hunter*, 104 N. C., 129, and the cases there cited.

The ground for the plaintiff's application for relief by injunction pending the action is the allegation, in substance and effect, in the complaint—not made as explicit and certain as it should be—that the judgment in the action referred to in favor of the defendant Lassiter, executrix, against the defendant C. A. Pitts was for a greater amount than was due, was collusive and fraudulent, and intended to defeat the rights of the plaintiff and other creditors of C. A. Pitts, &c. The purpose is to prevent the defendants, pending the action, from selling the land to satisfy the judgment so alleged to be fraudulent, thus embarrassing and confusing the plaintiff's rights, and, perhaps, defeating them altogether as to the lien.

The evidence makes it clear that the plaintiff has a judgment, as alleged by him, against the defendant C. A. Pitts; that the latter has an equitable interest in the land specified, and that that judgment is a lien thereupon that may be enforced by this action. The evidence as to the alleged fraudulent judgment is less satisfactory. The matter is not free from doubt, in view of the evidence before us. There are facts—some admitted, others denied—that tend to prove fraud; there are others that tend quite as strongly to prove the contrary. The defendants confess and avoid in material respects. They cannot suffer serious injury by delaying the sale of the property until the action can be determined upon its merits. In such a case, the injunction will be continued until the hearing. *Whitaker* v. *Hill*, 96 N. C, 2, and cases there cited.

The defendant alleges and insists that the sureties of the plaintiffs' judgment are solvent, and he might readily collect the judgment from them. It is sufficient to say that he is not bound to collect his debt from them. He has the right, and he may deem it just and his duty, to collect it from the principal debtor.

There is no error. Affirmed.

H. H. BURWELL et al. v. W. H. S. BURGWYN.

Usury—Mortgage—Judgment.

1. When B. made a mortgage to W. to secure the indebtedness of a firm at and after a certain time, and also before that time there was other indebtedness due by the firm to W., upon all of which usurious interest had been charged: *It was held*, that B. could not be allowed a rebate for usury, so charged before she made the mortgage.
2. She could only be affected by usurious interest charged after she became liable for the debts of the firm, and then only to the extent of her liability.
3. Where the usurious interest is reduced to and included in a judgment, the judgment cannot be impeached as to that part, but is valid as a whole.
4. The proceeds of sale of B.'s mortgaged land must be applied to the discharge of the mortgage debt rendered to judgment, without regard to the fact that a part of it is usurious.

PLAINTIFFS' APPEAL.

This was a CIVIL ACTION, tried before *Armfield, J.*, at the February Term, 1889, of VANCE Superior Court.

The facts necessary to an understanding of this case, not set forth herein, are to be found in *Burwell* v. *Burgwyn*, 100 N. C., 389

The amount was again referred to the former referee Young to state an account in conformity with the opinion of the Court. The parties plaintiffs are H. H. Burwell, J. S. Burwell and W. S. Stark, constituting the firm of Burwell Bros. & Co., and H. H. Burwell and Sophia W. Burwell, his wife. The last named joined her husband in a mortgage to secure the indebtedness of the firm.

The Court decided at the hearing of *Burwell* v. *Burgwyn*, above cited, that five-ninths of the interest charged the plaintiff firm by the defendant was usurious and directed a reference to reform the account between the parties in this respect. Accordingly, the referee re-opened the account.

The plaintiff Sophia W Burwell claimed that the account between Burwell Bros & Co. and defendant must be reformed from the beginning of that account in 1882.

The defendant insisted that the account could not be reformed as to Mrs. S. W. Burwell, further back than the date of her signing the bond and mortgage, August 17, 1885, and if so, then certainly no further back than the time embraced in the former reference, September 7, 1884, two years before the commencement of this action.

The referee found the following facts:

1. That stating an account from the time of the signing of the bond, deducting all over 8 per cent., made a difference of $532.16 in favor of plaintiffs

2. That stating account from September 7, 1884, the time covered by the former reference, would make a difference of $798.87 in favor of plaintiffs.

3. That stating account from the beginning of transactions with Burwell Bros. & Co., in 1882, would make a difference, in favor of plaintiffs, of $1,357.98.

Referee found the following conclusions of law:

1. That the amount to be stricken out under the said decision of the Supreme Court is $798.87.

2. That plaintiffs are indebted to defendant in the sum of $5,171.42.

Defendant excepted to referee's reforming the account as far back as September 1, 1884, and insisted that he could go back no further than August 17, 1885.

Plaintiff Sophia W. Burwell filed numerous exceptions.

Plaintiff S. W. Burwell filed numerous exceptions, some of which relate to matters passed on in the former opinion above cited, and others which are immaterial.

The case was referred to a special referee, Norfleet, who found, among other things, that the sum of $4,612.31, due defendant after making the deduction for usurious interest of $1,357.31, was still further reduced by credits on account of sale of land and other judgments by $2,922.24.

The following facts are the material parts of the statement of the case:

It appeared in said report that said amount—twenty-nine hundred and twenty-two dollars and twenty-four cents—included the sum of four hundred and seventy-two dollars and sixty-three cents, with interest from August 1, 1888, at 8 per cent. up to February 18, 1889, which was received by the said defendant from C. M. Cooke, Esq., commissioner, from the sale of the residence of W. S. Starke, one of the firm of said Burwell Bros. & Co., in the town of Henderson, N. C., which said property had been conveyed to defendant, as trustee, by said Starke and wife by deed, dated May 3, 1886, and duly recorded in said Vance County, to secure his $5,000 note, due by said Starke to H. H. and Joseph S. Burwell, the other two members of said firm of Burwell Bros. & Co., which note had subsequently been assigned by said H. H. and Jos. S. Burwell to said defendant as collateral security for debt by said firm to defendant; and also included the sum of five hundred and twelve dollars and fifty cents, with interest from January 7, 1889, at 8 per cent., up to February 18, 1889, which was the proceeds of the sale of the interest of the said W. S. Starke in four hundred and twenty-four and one-half acres of land in Virginia, which had been conveyed by the said Starke and wife to the said defendant, as trustee, by deed, dated May 3, 1886, and duly recorded in said Vance County, N. C., and in said Mecklenburg County, Va., to secure his $5,000 note, due by said Starke to said H. H. and Joseph S. Burwell, which said note was subsequently assigned by said H. H. and Joseph S. Burwell to defendant as collateral security for debt due by said firm to defendant.

To so much of said special referee's (Norfleet) report as applied said two amounts to the payment of said judgment against plaintiff S. W. Burwell, defendant excepted, his contention being that said amounts should be applied to the payment of the judgment against said firm of Burwell Bros. & Co.

It appeared that on the payment of the purchase price, to-wit, five hundred and fifty dollars and fifty cents, less expenses of sale, defendant immediately, to-wit, January 7, 1889, entered the same as a credit on the judgment against said firm of Burwell Bros. & Co heretofore obtained by him.

The Court below overruled defendant's above exception, to which order of the Court below overruling the same, and to the order of said Court overruling defendant's exception to referee's (Young) report, and also to the order of said Court overruling conclusions of law Nos. 1 and 2 of said referee's (Young) in his said report, and also the judgment of said Court in this cause, to wit, that the said Sophia W. Burwell is indebted to the defendant in the sum of four thousand six hundred and twelve dollars and thirty-one cents, with interest at 8 per cent. till paid—the same to be credited with the payments as found in said special referee's (Norfleet) report—defendant excepts, and prays the Court to sign and seal this bill of exceptions.

The plaintiffs, Burwell Bros. & Co., are insolvent.

Upon the facts as above set out, the Court rendered the following judgment:

"This cause coming on to be heard upon the amended report of referee J. R. Young, made in compliance with the judgment of the Supreme Court in said cause, and exceptions thereto filed by plaintiff and defendant, and argument of counsel thereupon, it is hereby ordered, adjudged and decreed that exceptions filed by said Sophia W. Burwell, to-wit, exceptions 1, 2, 3, 6 and 9, are overruled, and that exceptions of plaintiff, Nos. 4 and 5, are withdrawn and exceptions Nos. 7 and 8 are sustained, and further exception filed by defendant is overruled; and further, that said amended report in all other respects is affirmed, and that the said William H. S. Burgwyn do recover of the said Sophia W. Burwell the sum of four thousand six hundred and twelve dollars and thirty-four cents, with interest at eight per cent. from September 1, 1886, until paid, and costs of this action, to be taxed by the Clerk, subject to the following credits, as of the 18th day of February, 1889, to-wit, the sum of twenty-nine hundred and twenty-two dollars and twenty-seven cents.

"It is further ordered and adjudged that, unless the above judgment and interest shall be paid on or before the first day of April, 1889, then the commissioner, C. M. Cooke, heretofore appointed by the Court in this cause, be and the same is hereby directed and empowered to sell at public auction at the court-house door in the town of Henderson, Vance County, N. C., to the highest bidder, for cash, after having advertised the same for thirty days in the *Gold Leaf* newspaper, published in the town of Henderson, the real estate of the said Mrs. Sophia W. Burwell, to-wit, the house and lot mentioned in the pleadings in this cause, and which is situate in the town of Henderson, N. C., and known as the Burwell residence, on Chestnut and Orange and Horner streets, and execute deed to the purchaser, and pay the proceeds to the defendant William H. S. Burgwyn in satisfaction of said judgment and cost, including said commissions, compensation of five per cent., and surplus, if any, over to the plaintiff."

From the above judgment the plaintiff and defendant each appealed.

Mr. T. M. Pittman, for plaintiff.

Messrs. R. H. Battle, S. F. Mordecai, W. H. S. Burgwyn and A. C. Zollicoffer, for defendant.

MERRIMON, C. J.: The judgment of this Court in this case, when it was here by a former appeal (*Burwell* v. *Burgwyn*, 100 N. C., 389), had reference only to the liability and rights of the *feme* appellant therein, who is the present appellee, and it was no part of its purpose to interfere with or modify, in any respect, the judgment of the Court below against Burwell Bros. & Co. in favor of the defendant, the present appellant, because they did not appeal. What the Court then said and directed to be done in respect to the usurious character of the contract between the last named parties was with the sole view to settle the rights of the present appellee growing out of it.

The case cited *supra* settled, in effect, that the purpose of the appellee's single bond and the mortgage of the land to secure the same, executed by her to the defendant appellant, was to secure the indebtedness due him from Burwell Bros. & Co. *at the time* she executed that bond, or that might so arise and come due thereafter, less any usury thereon paid or agreed to be paid. So that, under the re-reference directed, one material inquiry the referee was required to make was, when did such indebtedness, existing at that time, first begin to exist? It appears that the dealings between Burwell Bros. & Co. and the defendant began in 1882, and continued current, or nearly so, for several years, but the indebtedness arising was discharged, and renewed and discharged, from time to time, and very many times, until a further final indebtedness arose and continued to exist at the time, and after the bond and mortgage were executed. Such indebtedness so arising the appellee assumed liability for. While her liability should not be increased by exactions of unlawful interest pending the currency of her contract to secure to the appellant defendant the indebtedness of Burwell Bros. & Co. to him, she cannot have benefit of such interest paid by them to the appellant, on account of former like indebtedness that had been discharged before her liability began. She had not obliged herself in any way to discharge such former indebtedness, and the interest paid on account of it did not affect her liability adversely, or concern her at all, in a legal or equitable point of view. Her right to be relieved as to the usury, rests upon the ground that it is unlawful, and she contracted, in legal effect, to be liable only for lawful interest. The contract between Burwell Bros. & Co. with the defendant to supply them with money was continuous—current; but their indebtedness to him was not; as we have said, it arose and was discharged from time to time. If they saw fit to pay an unlawful rate of interest before the appellee's liability began, as explained above, they had the right to do so; that they did, could not concern her, because she was not bound for such indebtedness; it did, however, concern her after she became liable, because she might have to discharge the indebtedness, and she was not bound to pay usury, or discharge the indebtedness increased by it. Her engagement did not embrace unlawful interest, in terms, and, if it had done so to that extent it would not have been binding.

The judgment in this action against Burwell Bros. & Co. in favor of the defendant appellant, so far as appears, is valid, although it embraced some usury. This did not vitiate or affect its validity. They were insolvent, and, several months after the appellee's liability began, two members of the firm transferred to the defendant a promissory note for five thousand dollars as collateral security for their indebtedness to him, and the maker of the note secured the same to him by a mortgage of certain real estate therein specified, which real estate was afterwards sold—part of it under a decree of the Court.

The appellee insisted, and the Court below held, that the proceeds of such sale of lands should be so applied as to reduce her liability, as above explained, on account of the judgment mentioned, because the judgment embraced unlawful interest that she was not bound to pay. In other words, the Court held that such proceeds should be applied only to discharge, in part, so much of the judgment as she was liable to pay.

The appellant contends, on the contrary, that he has the right to apply the proceeds of such sale, so far as the same may be sufficient, to the discharge of the judgment, unaffected by any right of the appellee, and we think his contention is well founded. The judgment was valid, and the judgment debtors had the right and were bound to discharge the whole of it, although it embraced usury. They might do so by paying cash, or they might devote any property, rights or credits they might have to that purpose, as it appears they did do to some extent, and the appellant had the right to accept such payment, or the security given, and that without regard to the liability of the appellee. The debtors had the right, without regard to her liability, to secure their indebtedness, in whole or in part, including usury, before the judgment was given, and she had no right to compel them to pay or secure only the valid part thereof, if they chose to do otherwise. They transferred the note mentioned, which was afterwards secured by the mortgage of the land mentioned, to secure their indebtedness to the appellant, according to their contract with him; he obtained judgment against them for that indebtedness, including usury, and the proceeds of the sale of the land must be applied, so far as the same may be sufficient, to the discharge of the judgment, and without regard to the usury embraced by it. This is so, because the debtors so agreed to apply the note, or the proceeds thereof. No doubt, before the judgment was obtained against them, they might have availed themselves of the plea of usury, and thus have had the proceeds of the sale applied to the indebtedness, less the usury, but the judgment has put all question as to that out of the way. The whole indebtedness, including the usury agreed to be paid, has been merged in and rendered valid by the judgment as to Burwell Bros. & Co., and they, as they had the right to do, made the note mentioned collateral security for the whole indebtedness embraced by it.

There is error. The judgment must be set aside and the same referee directed to correct the account in accordance with this opinion, and further proceedings had in the action according to law.

Error.

H. H. BURWELL et al. v. W. H. S. BURGWYN.

Usury Contract—Res Judicata—Referee.

When the exceptions to the report of a referee are overruled, and, upon appeal to this Court, judgment is affirmed, such exceptions cannot be reviewed, and the questions raised by them and passed upon by this Court cannot be unsettled.

DEFENDANT'S APPEAL.

The facts in this case are sufficiently set out in the plaintiffs' appeal.

Mr. T. M. Pittman, for plaintiffs.

Messrs. R. H. Battle, S. F. Mordecai, W. H. S. Burgwyn and *A. C. Zollicoffer*, for defendants.

MERRIMON, C. J.: Where, in an action, exceptions to the report of a referee are overruled, and, upon appeal to this Court, the judgment is affirmed, such exceptions cannot be reviewed, nor the matter to which they refer be further contested in the course of the reference in other respects. Such matters are thus settled, and cannot be disturbed, except as they may be affected, incidently, by some order or judgment of the Court in the course of the action.

When this case was before this Court by a former appeal (*Burwell* v. *Burgwyn*, 100 N. C., 389), we sustained the principal exception of the *feme* plaintiff, the present appellant, and, as to her other exceptions, said: "The other exceptions are untenable, and we sustain the action of the Court in overruling them." Thus, the judgment of the Court below, overruling the exceptions of the appellant, was affirmed, except in a single respect, and the report was not open to further exception, other than as to that sustained.

The exceptions 1, 2, 3, 6, 9, embraced by the present assignment of error, refer to matters in controversy so settled by the first report and former appeal, and their purpose is, in effect, to re-open the report, to some extent, as to such matters. The affidavit offered and rejected, was intended to be in aid of such purpose. The report itself supplied sufficiently the data and information suggested by it. The Court, therefore, properly declined to receive the affidavit, and overruled the exceptions.

We have examined the other exceptions of the appellant, and are of opinion that they are not well founded, and hence affirm the judgment of the Court overruling them.

The judgment, in the respects appealed from by the appellant, must be affirmed.

Affirmed.

INDEX.

INDEX.

ACTION:

Removal of, 440.

ADMINISTRATION:

1. An administrator ought not to be charged with doubtful notes and accounts, in the absence of anything to show they could have been collected, especially when they appeared to be under the control of some of the plaintiffs. *Gay* v. *Grant*. 478.
2. In a proceeding by an administrator to sell the lands of his intestate to make assets, the heir can plead the statute of limitations to such claims of creditors as have not been reduced to judgment against the administrator. The heir is bound by such judgment, unless he can show that it was obtained by collusive fraud. *Proctor* v. *Proctor*, 222.
3. So, where P. was the attorney of an executrix and trustee under a will (she having also an interest in the property devised), who was afterwards removed and another administrator *d. b. n. c. t. a.*, having adverse interest, was appointed in his place, and P. became his attorney in the settlement of the estate: *Held*, that P.'s relations were so conflicting and antagonistic that the law would not sanction his action, and this, though no compensation was actually paid him. *Gooch* v. *Peebles*, 411.
4. And where, in proceedings by such administrator to sell certain lands of his testator for assets, the attorney, P., who, having purchased an interest of the testator's husband in the lands, was co-defendant with his client, the executrix, obtained a decree of Court without her knowledge, whereby he became entitled to the surplus proceeds of such sale: *Held*, he could acquire thereby no interest adverse to hers, and the decree should be vacated, so far as it affected or declared his interest. *Ibid.*
5. The conflict of his *duty* as attorney for the administrator, charged with protecting the interests of the executrix and her *cestui que trustant* under the will with his interest, as one of the defendants asserting a claim against the estate, cannot be permitted in a Court of justice. *Ibid.*

ADMISSIONS:

Of obligor in bond, 1.

ADVANCEMENTS: See LIEN.

ADVERSE POSSESSION:

1. In proving continuous adverse possession under color of title, nothing must be left to conjecture. The testimony, if believed, must show the continuity of the possession for the full statutory period, in plain terms, or by necessary implication. *Ruffin* v. *Overby*, 78.
2. One entering upon land under a deed, or color of title, that definitely describes the metes and bounds of the land conveyed, or purporting to be passed to him, is presumed to prefer claim to all of the land covered by the paper title under which he holds, and no further. *Ibid.*
3. Where one enters upon land as a lessee of a definite portion of the territory covered by the deed under which his lessor claims, the possession of the former *enures* to the benefit of his landlord to the outside limits of the latter's deed. *Ibid.*
4. The fact that the ancestor of the plaintiff sank a shaft for mining purposes, or built a house for laborers who were working in a mine on the land, would not be sufficient to show title under color in such ancestor, unless it had appeared, also, that the house had been continuously occupied or the mine regularly worked for seven years. *Ibid.*
5. Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a possession that will mature title. *Ibid.*
6. Whatever doubt may have been entertained as to the competency of tax-lists, in cases like the present, this Court has decided that proof of listing land for taxation is admissible as an act done in pursuance of law and under a claim of ownership, though of very slight import as evidence of title; but, if the testimony had been admitted, the plaintiffs would still have failed to make a *prima facie* case, and the error does not entitle them to a new trial. *Ibid*

AGENCY:

1. The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. An agency to execute a mortgage given in this manner gives no validity to the mortgage. It is not the corporations act, which can only be authorized in the mode required by law. *Duke* v. *Markham*, 131.

2. The use by the company of money raised by such mortgage would not, of itself, be a ratification. If the company ratify the mortgage, it would not validate it as to other creditors if the mortgage is invalid when registered. *Ibid.*

3. When a mortgage by a corporation is signed by the president, secretary and two stockholders, and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowledged by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. *Ibid.*

4. Where W. & Co., bankers, held certain funds as agent for the payment of land, and also held a deed to the land, which was to be delivered when certain corrections were made, and, pending correspondence on this subject, W. & Co. mixed the fund with the assets of the bank, and thereafter made a general assignment of all their effects for the benefit of creditors: *Held* (1) there had been no delivery of the deed, and the maker of the deed could not recover from the assignee the fund deposited to pay the purchase-money upon delivery; (2) the action being one at law to recover a specific sum, and not involving any equitable element, the plaintiff, failing to establish his demand, was liable for costs. *Griffith* v. *Winborne*, 403.

AGRICULTURAL LIEN: See Lien.

ALTERNATIVE JUDGMENTS:

Not allowed in either civil or criminal actions. *In re Deaton*, 59.

AMENDMENT:

1. Where a complaint, in an action begun before the Clerk, as Probate Court, states matters properly triable in that Court, an amendment cannot be allowed in the Superior Court engrafting matters of which the latter Court alone has jurisdiction. *Robeson* v. *Hodges*, 49.

2. When, without amendment in such case, matters are investigated without objection, of which the Superior Court alone had jurisdiction, and judgment is rendered thereon, the implied consent does not confer jurisdiction, and advantage can be taken of the defect in this Court. *Ibid.*

AMERCEMENT:

Amercement, and not civil action, is the remedy given against a Sheriff for not making "due and proper" return of process. *Manufacturing Co.* v. *Buxton*, 74.

APPEAL:

1. When an appeal is dismissed for failure to comply with Rule 28 of the Rules of the Supreme Court, which requires a specified number of printed copies of the statement of the case on appeal to be filed, a reinstatement of the case on motion is not a matter of course, but will only be allowed *on good cause shown*. *Horton* v. *Green*, 104 N. C., 400, cited and approved. *Whitehurst* v. *Pettipher*, 39.
2. The refusal of the Court below to set aside a verdict on the ground that it was against the weight of the evidence cannot be reviewed on appeal. *Ibid.*
3. The Court will not consider any exception not set out in the "case on appeal," other than exception to the jurisdiction, or because the complaint does not state a cause of action, or to the sufficiency of an indictment. Rule 27 and *The Code*, §550; *McKinnon* v. *Morrison*, 104 N. C., 354; *Taylor* v. *Plummer* and *Walker* v. *Scott* (at this term) cited and approved. *Ibid.*
4. An appeal from an order sustaining an exception to a referee's report and recommitting the case to the referee to take further evidence is premature and will be dismissed. *Wallace* v. *Douglas*, 42.
5. When there is no exception taken except to the judgment, usually no case on appeal is necessary, and it is sufficient to file the exceptions thereto in ten days after judgment, as provided by Rule 27 of this Court. *Robeson* v. *Hodges*, 49.
6. Where there are no exceptions stated in the case on appeal, and no errors appear upon the face of the record, the judgment must be affirmed. *Taylor* v. *Plummer*, 56.
7. The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to (*The Code*, §412 (3)), but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal (*The Code*, §550), and if this is not done, the exception is deemed waived (Rule 27 (4)). *Ibid.*
8. By inherent right, as well as by statute, every Court has the power to punish contempts committed in its presence, or so near as to interfere with the transaction of its business, and in such cases no appeal lies to any other Court. *In re Deaton*, 59.
9. Where the contempt is not committed in the presence of the Court, but, as here, by the willful disobedience of the process of the Court, and the publication of grossly inaccurate accounts of its proceedings in a newspaper with intent to bring the Court into contempt, an appeal lies. *Ibid.*

10. On such appeal, if from the Superior Court to this Court, the findings of fact by the Judge are conclusive, and this Court can only review the law applicable to such state of facts. Otherwise, on appeal from a Court below the Superior Court to that Court, it is then the duty of the Superior Court Judge to review the facts and the law, and, in his discretion, he can hear additional testimony, orally or by affidavit. *Ibid.*

11. It is the duty of the Court passing sentence in proceedings for contempt to set out in the record the facts found upon which judgment is passed. If the contempt consists in publishing "grossly inaccurate accounts of the proceedings of the Court," the findings must show that the publication was made with intent to bring the Court into contempt, and the language used must be found and set out. *Ibid.*

12. When, in an action against a Sheriff for a false return, the Court permits such return to be amended, the plaintiff should note his exception, and, unless the amended return is admitted to be true, proceed to try the issue. An appeal before final judgment on such admission, or a verdict, is premature, and will be dismissed. *Manufacturing Co.* v. *Buxton*, 74.

13. When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee, upon filing the certificate required by Rule 17, is entitled, upon motion, to have the appeal docketed and dismissed. *Rose* v. *Shaw*, 126.

14. If an appeal is not docketed before the call of that district, at next term of this Court, is concluded, the appellee, upon exhibiting the certificate of the Clerk as required by Rule 17, may docket and have the appeal dismissed. Head-note in *Bryan* v. *Moring*, 99 N. C., 16, corrected. *Bailey* v. *Brown*, 127.

15. It is the duty of the Clerk within twenty days after the case on appeal is filed in his office to send up a transcript to this Court (*The Code*, § 551), but not unless his fees are paid by the appellant: *Semble*, that leave to appeal in *forma pauperis* does not excuse appellant from paying costs of transcript. *Ibid.*

16. If the transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, the appellee may move to docket and dismiss the appeal. *Ibid*,

17. When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and counter-case *de novo*, and upon disagreement,

case on appeal to be settled by the Judge, *nunc pro tunc*. *Mitchell* v. *Haggard*, 173.

18. An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of Court, and defendant thirty days thereafter," entitles defendant to thirty days after *service* of appellant's case. *Ibid.*

19. An appellee may serve a "counter case" to the "case on appeal," served by the appellant, instead of specific exceptions. *Horne* v. *Smith*, 322.

20. The conclusion of the Court below as to the fact of delivery, supported, as it was, by some evidence, will not be reviewed in this Court. *Avent* v. *Arrington*, 377.

21. When the jury rendered their verdict for the plaintiff, and thereupon the Court, before rendering judgment upon the verdict, made an order of reference for an account between the parties to ascertain the balance due, to which no exception was made, but defendant appealed: *Held*, that such appeal must be dismissed as premature. *Blackwell* v. *McCaine*, 460.

22. When the Court below enters interlocutory judgments or orders, exceptions taken thereto cannot, generally, be brought up for review until after final judgment. *Ibid.*

23. When appellant is not seriously prejudiced by delay, and not deprived of any substantial right by the rendition of an interlocutory judgment, &c., the regular and orderly method of procedure is to except and proceed to final judgment, so that the appeal may bring up the whole case at once. *Ibid.*

24. When this Court, in its application of the law to the facts of a case, omits to consider material facts, and the interests of parties are thereby affected, a petition to rehear will be granted, and, in so far, the former opinion will be modified and judgment reformed. *Gay* v. *Grant*, 478.

25. The question of rejecting a letter offered in evidence is not reviewable in this Court unless the contents of the letter are sent up with the record. *Taylor* v. *Navigation Co.*, 484.

Appeal, when premature, 191.

ARBITRATION AND AWARD:

1. An award duly made upon an arbitration, and performed, constitutes a good plea in bar to a subsequent action for the same cause. *Cheatham* v. *Rowland*, 218.

2. Where the defendant pleads in bar of an action that the whole cause of action alleged in the complaint has been the subject of arbitration, and the award performed, and also alleges in his

answer that he never had notice of plaintiff's claim until after the arbitration: *Held*, that the answer did not admit that the plaintiff's claim had not been submitted to the arbitrators, and that it was competent for defendant to prove that it had been considered and was embraced in the award. *Ibid.*

ARREST: See False Imprisonment.

ASSETS, Petition to Make Real Estate:

1. In a proceeding by an administrator to sell the lands of his intestate to make assets, the heir can plead the statute of limitations to such claims of creditors as have not been reduced to judgment against the administrator. The heir is bound by such judgment, unless he can show that it was obtained by collusive fraud. *Proctor* v. *Proctor*, 222.
2. Where in such proceeding the defendant (heir) pleaded that "if there is any indebtedness outstanding against the estate of plaintiff's intestate, the same is barred by the statute of limitations" (*The Code*, §153, par. 2), "and the said statute of limitations is hereby pleaded against the collection of said claims: *Held*, that although the plea is indefinite and unsatisfactory, it was the duty of the Court below to have considered and determined it, and a failure to do so is error. *Ibid.*

ASSIGNMENT:

1. The words "we promise to pay to L. & B., out of the proceeds of certain railroad ties we have now in Hertford County. amounting to forty-two hundred, the sum of a hundred and thirty-two dollars, * * * and authorize the purchaser to retain that amount for them," contained in a promissory note, are not sufficient to constitute it a chattel mortgage or an equitable lien, though duly proved and registered. *Britt* v. *Harrell*, 10.
2. Nor is such instrument a sufficient equitable assignment of the ties or the proceeds thereof, to the payment of the debt. *Ibid.*
3. The fact that a debtor, in a deed of assignment, reserves to himself the personal property exemption allowed him by the Constitution and laws of the State, does not affect the validity of the deed, and is no evidence of a fraudulent intent. It is not necessary, in this case, to decide whether the reservation in the deed of five hundred dollars of the money arising from the sale of property by the assignee would raise a presumption of fraudulent intent, and make, under the deed, as held by the Court below, fraudulent *per se*. *Bobbitt* v. *Rodwell*, 236.
4. Where W. & Co., bankers, held certain funds as agent for the payment of land, and also held a deed to the land, which was

to be delivered when certain corrections were made, and, pending correspondence on this subject, W. & Co. mixed the fund with the assets of the bank, and thereafter made a general assignment of all their effects for the benefit of creditors: *Held*, (1) there had been no delivery of the deed, and the maker of the deed could not recover from the assignee the fund deposited to pay the purchase-money upon delivery; (2) the action being one at law to recover a specific sum, and not involving any equitable element, the plaintiff, failing to establish his demand, was liable for costs. *Griffith* v. *Winborne*, 403.

ATTORNEY AND CLIENT:

1. An attorney cannot terminate his relation with his client at pleasure and without notice, so long as anything remains to be done about the matter in which he is employed. *Gooch* v. *Peebles*, 411.
2. So, where P. was the attorney of an executrix, and trustee under a will (she having also an interest in the property devised), who was afterwards removed and another administrator *d. b. n. c. t. a.*, having adverse interest, was appointed in his place, and P. became his attorney in the settlement of the estate: *Held*, that P.'s relations were so conflicting and antagonistic that the law would not sanction his action, and this, though no compensation was actually paid him. *Ibid.*
3. And where, in proceedings by such administrator to sell certain lands of his testator for assets, the attorney, P., who, having purchased an interest of the testator's husband in the lands, was co-defendant with his client, the executrix, obtained a decree of Court without her knowledge, whereby he became entitled to the surplus proceeds of such sale: *Held*, he could acquire thereby no interest adverse to hers, and the decree should be vacated, so far as it affected or declared his interest. *Ibid.*
4. The conflict of his *duty* as attorney for the administrator, charged with protecting the interests of the executrix and her *cestui que trust* under the will with his interest, as one of the defendants, asserting a claim against the estate, cannot be permitted in a Court of justice. *Ibid.*
5. Discussion by DAVIS, J., of the duties and responsibilities of attorneys in their relations to their clients. *Ibid.*

BANKS AND BANKING:

1. In an action by a receiver of a National bank to recover the amount of certain drafts and checks drawn by one S. on the bank, and paid by it during its existence: *Held*, that the then president's authorizing such transactions to pay debts due by himself, though with the knowledge of the cashier of the bank, is no sufficient defence. *Dowd* v. *Stephenson*, 467.

2. The president and officers of the bank, other than the directors, have no authority to appropriate its moneys for the payment of private debts. *Ibid.*

3. The defendant cannot be in the place of one who had made "over-drafts," for he had no deposit in the bank. *Ibid.*

BILLS, BONDS AND PROMISSORY NOTES:

1. Where a single bond was executed in 1860, and more than ten years. exclusive of time between May, 1861, and January, 1870, had elapsed before the bringing of an action upon it, there is a presumption of payment or satisfaction thereof. *Grant* v. *Gooch*, 278.

2. To rebut this presumption, the admissions of the maker and his administrator are both competent; but the mere admission of the administrator that *he* had not paid it would not be sufficient to rebut the presumption as to his intestate. *Ibid.*

3. Ordinarily, evidence to rebut the statute of presumptions ought to embrace the whole period. *Ibid.*

4. Where, in a former action in which *the same* instrument was in controversy, the administrator of the maker did not deny the *allegation* that the bond had not been paid: *Held*, that upon the trial of a subsequent action, in which the question of payment was an issue, the record of this admission could be read as evidence to rebut the presumption of payment. *Ibid.*

5. The fact that such former action was decided in favor of the defendant cannot avail to affect or lessen the weight of the admission. *Ibid.*

6. Where the plaintiff, endorsee of a negotiable note, produces the same at trial in a suit for the consideration, its execution being admitted, the law presumes the plaintiff is the owner, and that it was assigned to him before maturity, no evidence being offered to rebut this presumption. *Applegarth* v. *Tillery*, 407.

7. Where the only evidence affecting the *bona fides* of the *endorsement* was that, at the time of the *execution*, there were some facts that might have indicated fraud on the part of the *payee*: *Held*, that the plaintiff (endorsee) was entitled to the instruction that there was no sufficient evidence to go to the jury that the plaintiff was not the owner of the note, and that a failure on the part of the Court below to give this instruction, when asked, entitled the plaintiff to a new trial. *Ibid.*

BOND: See Bills, Bonds and Promissory Notes.

BOND, OFFICIAL:

1. When the proceeds of real estate, in proceedings to foreclose a mortgage given by a person since deceased, is paid into the

Clerk's office by judicial order, and subsequently it is directed that the surplus of the fund, after payment of mortgage debt, be paid to the administrator of the mortgagor, as assets to pay debts, non-compliance with such judgment is a breach of the bond, and the administrator is the proper party to maintain an action therefor. *Sharpe* v. *Connelly*, 87.

2. The sureties on the bond at the time such breach occurs, are not discharged by the Clerk subsequently renewing his bond with other sureties. *Ibid.*

BRIEF OF COUNSEL, On Rehearing, 44.

CASES OVERRULED: See OVERRULED CASES.

CAVEAT EMPTOR, 463.

CHARACTER:

Particular facts are inadmissible to prove general character, 23.

CLAIM AND DELIVERY:

Form of judgment in, 344.

CLERK:

1. When the Clerk of the Superior Court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution, and privy examination of a married woman by a Justice of the Peace, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function, which cannot be delegated to a deputy, nor exercised by the Clerk as to an instrument to which he is a party. *White* v. *Connelly*, 65.

2. Hence, when the Clerk, who is the grantor in a deed of trust, acknowledges the execution of the same before a Justice of the Peace, who also takes the privy examination of grantor's wife, and the Clerk adjudges the certificate made by the Justice of such acknowledgment and privy examination to be in due form, admits the instrument to probate and orders registration: *Held*, that such registration is without legal warrant, and invalid as to third parties. *Ibid*

3. When a mortgage is acknowledged, and wife's privy examination taken before a Justice of the Peace, but the adjudication that the same is in due form and the order of registration is made by a Clerk of the Superior Court, who is the mortgagee therein, the adjudication and order by the Clerk, and the registration thereunder, are void. *Turner* v. *Connelly*, 72.

4. When the proceeds of real estate, in proceedings to foreclose a mortgage given by a person since deceased, is paid into the

Clerk's office by judicial order, and subsequently it is directed that the surplus of the fund, after payment of mortgage debt, be paid to the administrator of the mortgagor, as assets to pay debts, non-compliance with such judgment is a breach of the bond, and the administrator is the proper party to maintain an action therefor. *Sharpe* v. *Connelly*, 87.

5. The sureties on the bond at the time such breach occurrs, are not discharged by the Clerk subsequently renewing his bond with other sureties. *Ibid.*

6. It is the duty of the Clerk within twenty days after the case on appeal is filed in his office to send up a transcript to this Court (*The Code*, § 551), but not unless his fees are paid by the appellant: *Semble*, that leave to appeal *in forma pauperis* does not excuse appellant from paying costs of transcript. *Bailey* v. *Brown*, 127.

7. If an appeal is not docketed before the call of that district, at next term of this Court, is concluded, the appellee, upon exhibiting the certificate of the Clerk as required by Rule 17, may docket and have the appeal dismissed. Head-note in *Bryan* v. *Moring*, 99 N. C., 16, corrected. *Ibid.*

Jurisdiction of, 52.

CODE, THE:

		PAGE.
Chapter	10	106
Section	56	402
"	68	402
"	102	54
"	104	69
"	105	71
"	116	249
"	137	280
"	152	226, 329, 332
"	190	444
"	195	124, 444
"	212	129
"	237	129
"	244	193
"	252	249
"	256	249
"	263	178
"	267	172
"	268	261, 276, 281
"	272	172
"	273	50
"	274	50, 497

PAGE.
Section 324 214, 349
" 391 31
" 412 41, 58
" 415 57
" 424 55
" 431 214
" 446 75
" 473 34
" 486 34
" 501 117
" 502 100, 106, 116
" 508 100
" 524 116
" 550 41, 57, 174
" 553 129
" 579 261
" 580 9
" 583 261
" 590 28, 456
" 624 445
" 625 445
" 650 61
" 651 65
" 654 64
" 685 137, 139
" 733 170
" 744 170
" 748 169
" 957 52, 58
" 963 63
" 965 50
" 1245 33, 389, 474
" 1246 67, 137, 414, 475
" 1251 474
" 1260 71
" 1275 466
" 1279 475
" 1357 163
" 1368 129
" 1371 124
" 1545 259
" 1546 259
" 1619 54
" 1781 19

		PAGE.
Section	1784	19
"	1790	131
"	1823	131
"	1826	310
"	1828	131
"	1831	131
"	1832	131
"	1943	249
"	1945	248
"	1946	248–249
"	1975	172
"	2079	75
"	2100	332
"	2101	332
"	2102	231
"	2104	231
"	2106	231–232
"	2107	231–232
"	2779	472–473
"	3328	472
"	3760	169
"	3818	65

COLOR OF TITLE:

1. In proving continuous adverse possession under color of title, nothing must be left to conjecture. The testimony, if believed, must show the continuity of the possession for the full statutory period in plain terms or by necessary implication. *Ruffin* v. *Overby*, 78.

2. One entering upon land under a deed or color of title that definitely describes the metes and bounds of the land conveyed, or purporting to be passed to him, is presumed to prefer claim to all of the land covered by the paper title under which he holds, and no further. *Ibid.*

3. Where one enters upon land as a lessee of a definite portion of the territory covered by the deed under which his lessor claims, the possession of the former *enures* to the benefit of his landlord to the outside limits of the latter's deed. *Ibid.*

4. The fact that the ancestor of the plaintiff sank a shaft for mining purposes, or built a house for laborers who were working in a mine on the land, would not be sufficient to show title under color in such ancestor unless it had appeared also that the house had been continuously occupied or the mine regularly worked for seven years. *Ibid.*

5. Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a possession that will mature title. *Ibid.*

6. Whatever doubt may have been entertained as to the competency of tax-lists, in cases like the present, this Court has decided that proof of listing land for taxation is admissible as an act done in pursuance of law and under a claim of ownership, though of very slight import as evidence of title; but, if the testimony had been admitted, the plaintiffs would still have failed to make a *prima facie* case, and the error does not entitle them to a new trial. *Ibid.*

7. An instrument, though signed, is not available to prove color of title unless it is delivered. *Avent* v. *Arrington*, 377.

8. The delivery of a paper-writing offered to show color of title may be proved by parol, and its probate and registration is not essential to such proof. *Ibid.*

9. *The Code*, §1245, amended by Laws of 1885, ch. 147, making a contract for sale of land inadmissible without registration, does not make registration essential to the use of a deed to show color of title, where there is a claim and possession under it. *Ibid.*.

10. Possession under color of title works notice to purchasers. *Ibid.*

COMMERCE, INTER-STATE: See INTER-STATE COMMERCE.

CONDEMNATION OF LAND: See EMINENT DOMAIN.

CONSTITUTION:

1. A creditor by contract has a vested right either to the remedy for the recovery of his debt that existed when the contract was made, or another sufficient remedy in its stead. *Long* v. *Walker* ,90.

2. In altering the remedy a State cannot, by law, impair its efficacy in the least degree, because the right to impair means a license to destroy. *Ibid.*

3. Before the year 1867 the creditor could cause execution to issue against the real and personal property of the debtor, and if there were no personal goods, or, in the opinion of the Sheriff, not sufficient to satisfy the debt, the officer was required to levy upon and sell, without embarrassment to the creditor, the whole body of the debtor's land, if necessary, at all events his entire interest in that sold. *Ibid.*

4. If the new remedy, as compared with that provided when the contract was made, has a tendency to diminish the value of the debt in the least degree, it is unconstitutional. *Ibid*

5. After the decision in the case of *Edwards* v. *Kearsey* (96 U. S., 100), this Court and the Legislature of the State declared the Act of 1869 unconstitutional as to debts contracted before the 24th of April, 1868, and the liabilities of citizens were settled by the sale of land to satisfy debts created before that date without allotment of homsteads. *Ibid.*

6. The Constitution (Art. I, § 19) guarantees the right to trial by jury, in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and in fixing the question of compensation to the land-owner for right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged exclusively and peculiarly to the jury. *Railroad* v. *Parker*, 246.

Article 4, section 12 62
" 10, " 2, 8 116
" 1, " 19 248

CONTRACT:

1. Formerly all contracts, or memoranda purporting to be contracts, to convey lands, were required by *The Code*, § 1245, to be registered before they could be admitted in evidence. *Quœre*, whether this requirement is dispensed with by ch. 147, Laws 1885. *Fortesque* v. *Crawford*, 29.

2. When C. agrees to deliver on board plaintiff's schooners at certain landings lumber every month till, in the aggregate, it shall amount to 4,500,000 feet, with the further stipulation that such cargo shall be shipped from the landing to Elizabeth City at plaintiff's risk, and there measured, inspected and paid for: *Held*, that the plaintiff was entitled to recover two cargoes, so shipped, in an action of claim and delivery brought against a creditor of C., who had caused one cargo to be seized before, and the other after, being discharged at Elizabeth City, under a warrant of attachment issued in an action against C. *Albemarle Lumber Co.* v. *Wilcox*, 34.

3. When property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or, by the terms of agreement, can be ascertained (as in our case by measurement and inspection), the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement until the quantity can be definitely determined, makes the sale complete. *Ibid.*

4. Where there is an actual delivery, but no distinct agreement as to the exact price of an article, and no means provided of making it certain, the title does not pass, and, if the person consume the article so delivered to him, he becomes liable on an implied promise to pay the reasonable value, but not by force of the inchoate contract to sell. *Ibid.*

5. A creditor by contract has a vested right either to the remedy for the recovery of his debt, that existed when the contract was made, or another sufficient remedy in its stead. *Long* v. *Walker*, 90.

6. In altering the remedy a State cannot, by law, impair its efficacy in the least degree, because the right to impair means a license to destroy. *Ibid.*

7. If there is no technical insurable interest, only the insurance companies can avail themselves of it as a defence on account of such contracts being against public policy. *Fertilizer Co.* v. *Reams*, 283.

8. A contingent assignment of an insurance policy, with the subsequent assent of the company, makes a new and valid contract with the *assignee*, and puts the legal title to the amount of the loss in him, and he may sue for it in his own name. *Ibid.*

9. Even if the assignments of the insurance policies were made to secure indebtedness, they were not void as against plaintiffs for want of registration, where the assignor and assignee were partners. *Ibid.*

10. The contract of a guarantor is a separate and distinct obligation from that of the principal debtor, and it is immaterial that the guaranty is written upon the same paper as the original obligation. His liability is not that of a surety. *Coleman* v. *Fuller*, 328.

11. In an action to declare, among other things, a contract rescinded, plaintiffs proposed to show that defendants offered to compromise the matter; the defendants, without objection, had already testified that, after failing to make settlement with plaintiffs, they had offered to accept a sum by way of compromise: *Held*, that while, generally, an offer of compromise is incompetent evidence, inasmuch as it was irrelevant in this case, its admission could not prejudice defendants, and was harmless. *Reavis* v. *Orenshaw*, 369.

12. Where it appeared from the evidence that both plaintiffs wrote to one of the defendants and asked him not to ship certain machinery previously ordered and contracted for, and the machinery was not shipped, and there was also an offer by the

plaintiffs to pay damages: *Held*, there was some evidence to go to the jury of a rescission of the contract. *Ibid.*

13. A contract where one *grants* to a company the right for ten years to land and receive all freights for a certain town amounts to more than a license. *Taylor* v. *Navigation Co.*, 484.
14. Taking this to be a mere right-of-way, it falls within the statute allowing registration (*The Code*, § 1264), in that it purports to convey an "interest in or concerning land." *Ibid*,
15. A contract signed by an authorized agent may be ratified by the company, and for this purpose its acts are sufficient. *Ibid.*
16. As there was nothing in the contract to forbid *plaintiff* having another wharf, evidence of this was inadmissible. *Ibid.*

CONTEMPT:

1. Alternative judgments are not allowed, either in civil or criminal cases, hence it is error to sentence a party to "pay a fine of $10, and in default thereof be imprisoned thirty days. *In re Deaton*, 59.
2. By inherent right, as well as by statute, every Court has the power to punish contempts committed in its presence, or so near as to interfere with the transaction of its business, and in such cases no appeal lies to any other Court. *Ibid.*
3. Where the contempt is not committed in the presence of the Court, but, as here, by the wilful disobedience of the process of the Court, and the publication of grossly inaccurate accounts of its proceedings in a newspaper with intent to bring the Court into contempt, an appeal lies. *Ibid.*
4. On such appeal, if from the Superior Court to this Court, the findings of facts by the Judge are conclusive, and this Court can only review the law applicable to such state of facts. Otherwise, on appeal from a Court below the Superior Court, to that Court, it is then the duty of the Superior Court Judge to review the facts and the law, and, in his discretion, he can hear additional testimony, orally or by affidavits. *Ibid.*
5. It is the duty of the Court passing sentence in proceedings for contempt to set out in the record the facts found, upon which judgment is passed. If the contempt consists in publishing "grossly inaccurate accounts of the proceedings of the Court," the findings must show that the publication was made with intent to bring the Court into contempt, and the language used must be found and set out. *Ibid.*

6. *The Code*, § 654, providing proceedings "as for contempt," applies only to civil actions,—except sub-sections 4, 5 and 6. It is only in proceedings as for contempt that the notice to show cause must necessarily be based upon an affidavit. *Ibid.*

7. A party charged with contempt is not entitled to a trial by jury. *Ibid.*

8. The mayor has jurisdiction to punish for contempt. *Ibid.*

CORPORATIONS:

1. The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. An agency to execute a mortgage given in this manner gives no validity to the mortgage. It is not the corporation's act, which can only be authorized in the mode required by law. *Duke* v. *Markham*, 131.

2. The use by the company of money raised by such mortgage would not, of itself, be a ratification. If the company ratify the mortgage, it would not validate it as to other creditors, if mortgage is invalid when registered. *Ibid.*

3. When a mortgage by a corporation is signed by the president, secretary and two stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowleded by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. *Ibid.*

4. Any conveyance or mortgage of its property executed by any corporation is void and of no effect as to the creditors of said corporation existing at the time of the execution of said deed or mortgage, and who shall commence proceedings to enforce their claims against the corporation within sixty days after registration of the conveyance. *Duke* v. *Markham*, 138.

COSTS:

1. When a reargument is ordered by the Court (Rule 38), and an additional brief is printed, the cost thereof, not exceeding ten pages, will be allowed to the successful party, under Rule 37. *Emry* v. *Railroad*, 44.

2. One C., as executor, recovered judgment against the defendant on a debt due to his testator by contract before the year 1867, and caused execution to issue. The defendant paid to the Sheriff the principal and interest of the judgment, and took his receipt therefor (not including costs). The Sheriff sold the land of

defendant, already levied on to satisfy the costs, at which sale plaintiff bought, and brings this action to recover possession: *Held*, that the right to recover disbursements, in case of default in payment, being secured by law, when the contract was made, entered into and formed a part of it, and such costs as incidents of the judgment constitute a lien upon the same property, and to the same extent, as the principal and interest of the debt. *Long* v. *Walker*, 90.

3. This lien exists in favor of the officers of the Court when they do not require the plaintiff, as they have a right to do, to pay their fees in advance. In such instances the officers (Sheriff and Clerk of the Court) have the right of retainer to the extent of the costs out of the amount collected, and neither can be compelled to look exclusively to the plaintiff's prosecution bond, nor prevented from exhausting his remedy against the debtor, by reason of any receipt or compromise between the judgment creditor and debtor. *Ibid.*

4. The receipt given in this case did not operate, like the receipt of principal and interest of a debt, while suit is pending for its collection, to extinguish plaintiff's claim against defendant for the costs incident to the action, in the absence of some special agreement to the contrary. *Ibid.*

5. If the sale of defendant's land under the execution would have been valid without allotting him a homestead thereon, when the principal and interest of the debt had not been paid, the estate of the debtor passed to the plaintiff under the sale to satisfy the costs due by virtue of the execution. *Ibid.*

6. If the creditor is required to pay the costs of allotting any homestead in advance and of selling successively the excess, the reversion and the homestead itself, and incurs the risk of paying such expenses without reimbursement, if the proceeds of all do not pay his debt, the value of the debt is diminished by the sum total of such expense and by the decreased amount realized by selling the reversionary interest and homestead separately. *Ibid.*

7. When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed, at the next term thereof, and before the term of the Court in the county to which it was removed, to direct that the action be dismissed if the costs of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript. *Fisher* v. *Mining Company*, 123.

8. When a motion to re-tax a bill of costs is made at the next term after judgment is entered, it is error for the Judge to hold that he has no power to entertain it. *Semble,* the motion could be made any time within one year after judgment. *In re Smith,* 167.

9. Usually, a ruling of the Court upon taxation of witness tickets is not appealable, but it is otherwise when the Court refuses to act on the motion, on the ground of a want of power. *Ibid.*

When plaintiff liable for costs, 403.

COUNSEL:

Observations by MERRIMON, C. J., upon the duties and responsibilities of counsel. *Emry* v *Railroad*, 45.

Agreement of—case on appeal, 173.

COUNTER-CLAIM, 191.

DAMAGES:

Where, upon an issue of damages for advertising for sale land embraced in a deed of trust securing a contract which had been rescinded, there was no evidence to go to the jury by which to determine the amount of damages: *Held,* that the charge of the Court that "if the jury shall decide that plaintiff is entitled to damages, the measure of his damages will be his loss resulting from inability to sell his land," etc., was error, and entitles defendant to a new trial. *Reavis* v. *Orenshaw*, 369.

DEED:

1. Prior to the present Constitution, a deed by husband to wife, founded on a valuable consideration, was upheld in equity. *Winborne* v. *Downing*, 20.

2. A deed which conveyed "to C. D. a certain parcel of land" (describing it) contained a clause as follows: "And I do further agree to warrant and defend the title of the same to her, the said C. D., her heirs or assigns forever," conveyed a fee-simple estate. *Ibid.*

3. Unless this construction is given, the words "to her heirs," and the term "forever," would be meaningless. *Ibid.*

4. Disorderly arrangement and punctuation may be disregarded when necessary to get the intention of the parties. *Ibid.*

5. A deed absolute on its face, but intended as a mortgage, cannot operate as such unless it is alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. *Green* v. *Sherrod*, 197.

6. Where the description in a *deed* offered to show title was "fifty acres of land lying in the county of Hertford and bounded as follows: By the lands of John H. Liverman, John P. Liverman and Isaac J. Snipes": *Held*, that the language left open for explanation by parol proof only the question whether there was a tract of land in Hertford County containing fifty acres, and so bounded by the lands of the three persons named as to separate it from the other tracts and indicate its limits with reasonable certainty. *Blow* v. *Vaughan*, 199.

7. In the *complaint* filed the land was described as "adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres: *Held*, that the description in the complaint was too vague to be explained by parol testimony, and if the transcript was correctly copied in the complaint, the action might have been dismissed for failure to state facts sufficient to constitute a cause of action, or after the evidence was heard the jury might have been told that there was a fatal variance between the allegations and the proof. *Ibid.*

8. A deed that contains no descriptive word or phrase sufficient, with the aid of competent extrinsic testimony, to identify and determine *all of its boundary lines*, will not pass any estate to the bargainee therein named. *Ibid.*

9. The test of the admissibility of evidence *dehors* the deed is involved in the question whether it tends to explain some descriptive word or expression contained in it, as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The rule is founded on the maxim, "*Id certum est quod certum reddi potest.*" *Ibid.*

10. The rule that the descriptive words in the deed must, with the aid of the *evidence aliunde*, to which they *point*, identify the boundaries of the land conveyed, has been sanctioned by the Courts, not only upon the idea that there must be a certain subject-matter, but because its observance is essential to a proper enforcement of the statute of frauds. *Ibid.*

11. The sufficiency of descriptions in levies were made to depend, in some instances, upon the construction given by the Courts to the statute (Rev. Code, § 16, ch. 62), prescribing what they should contain, and hence the Courts held descriptions in levies sufficiently definite that have been declared too vague in deeds of conveyance. *Ibid.*

12. Proof in this case that a tract of land, containing one hundred and twenty-five acres and belonging originally to John W.

Blow, from whom the ancestor of plaintiffs claimed, was completely surrounded and bounded by the lands of the three persons named in the deed, will not identify the land which the deed purports to convey, because there is no testimony to show in what part of it the fifty acres is to be laid off. (*Hinton* v. *Roach*, 95 N. C., 106, overruled.) *Ibid.*

13. Where two tracts of land were described in a Sheriff's deed as follows: "1st, a certain tract of land in aforesaid county, adjoining the lands of J. R. Conner and others, containing fifty acres, more or less; 2d, a certain tract of land in aforesaid county, adjoining the lands of J. B. Spivey and others, containing twenty-five acres, more or less": *Held*, that both descriptions were too vague and indefinite to be aided by parol proof. *Wilson* v. *Johnson*, 211.

14. The facts relied upon as the basis of a defence or counter-claim must be set out in an answer with the same precision as is requisite in a complaint, and, therefore, a defendant who expects to prove that there was an actual mistake by which the word "heirs" was omitted from a deed which he proposes to offer in evidence, or to insist that there is internal evidence in such deed that the grantor intended to convey the fee and omitted the word of inheritance by mistake, must set up his equity in his answer. *Anderson* v. *Logan*, 266.

15. The Courts, in order to carry out the intent of the grantor, where it could be gathered from the face of a deed, have construed conveyances as passing an estate of inheritance in all cases where the word "heirs" was joined as a qualification to the name or designation of the bargainees, even in the clause of warranty, or where the covenant of warranty was confused with the premises or *habendum*, if, by the transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word "heirs" could be made to qualify the apt words of conveyance in the premises, or the words "to have and to hold" in the *habendum* and *tenendum*, even though it was made to do double duty as a part of the covenant of warranty. *Ibid.*

16. Where there are no words of conveyance in the instrument, or where the word "heirs" does not appear in any part of the deed except in connection with the name of the bargainor, or with some expression such as "party of the first part," used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the Act of 1879 was passed, will be construed as vesting only a life-estate in the bargainee. *Ibid.*

17. Where the deed set forth that the bargainors, "for and in consideration of the sum of two thousand dollars to them in hand paid by J. W., doth give, grant, bargain, sell and convey all of the piece or parcel of land, or so much as our interest, lying and being," &c. (giving a description of the land), "to have and to hold all of our interest in the above-mentioned lot *from ourselves, our heirs* and all that may claim *under us* and our *assigns* forever, all that above-mentioned lot and premises": *Held*, that the bargainee took only a life-estate. *Ibid.*

18. When a certificate of probate is not sufficient to entitle the instrument to registration, if a party make it part of his pleading he waives the question of its admissibility. *Avent* v. *Arrington*, 377.

19. So likewise, defendant's admission that a paper-writing in question is the one attached as an exhibit in the pleadings, relieves the plaintiff of proving its contents, but its delivery and sealing may still be disputed. *Ibid.*

20. Where a deed is proved and registered there is a presumption of *proper* delivery, nothing more appearing. *Ibid.*

21. An instrument, though signed, is not available to prove color of title, unless it is delivered. *Ibid.*

22. The delivery of a paper-writing, offered to show color of title, may be proved by parol, and its probate and registration is not essential to such proof. *Ibid.*

23. *The Code*, § 1245, amended by Laws of 1885, ch. 147, making a contract for sale of land inadmissible without registration, does not make registration essential to the use of a deed to show color of title, where there is a claim and possession under it. *Ibid.*

24. Possession, under color of title, works notice to purchasers. *Ibid.*

25. The conclusions of the Court below as to the fact of delivery, supported, as it was, by some evidence, will not be reviewed in this Court. *Ibid.*

26. Declarations of grantor of delivery, being against his own interest, are admissible to show it. *Ibid.*

27. A deed, absolute upon its face, may be treated as a mortgage, when it was agreed, *at the time of its execution*, that such should be its purpose. But the proof of this should be strong and satisfactory. *Waters* v. *Crabtree*, 394.

28. But if the purpose of the deed was to operate as a mortgage, it cannot have that effect against subsequent *bona fide* purchasers for value and without notice. *Ibid.*

29. When such contemporaneous agreement is afterwards reduced to writing, it relates back to the execution of the deed. *Ibid.*

30. When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed: *Held*, that subsequent purchasers for value, without *actual* notice, whose deeds were duly recorded, were not affected with notice of such registration. *Ibid.*

31. Nor can re-registration of the defeasance in 1886, after the registration of the *mesne* conveyances to the innocent purchasers, avail to defeat their rights. *Ibid.*

32. Where, in such case, plaintiff had notice of the registration of the *mesne* conveyances, and of possession of defendants under them for fifteen years, and all this time and for eight years after paying the debt secured by the deed, he failed to register the defeasance or assert his claim: *Held*, he was guilty of gross negligence and not entitled to the relief of a Court of Equity. *Ibid.*

Evidence of intent of party to a deed, 23.

Registration of, 65.

DELIVERY:

Presumption of proper delivery, 377.

DESCRIPTION IN DEED:

1. Where the description in a *deed* offered to show title was "fifty acres of land lying in the county of Hertford, and bounded as follows: By the lands of John H. Liverman, John P. Liverman and Isaac J. Snipes": *Held*, that the language left open for explanation by parol proof only the question whether there was a tract of land in Hertford County, containing fifty acres and so bounded by the land of the three persons named as to separate it from other tracts and indicate its limits with reasonable certainty. *Blow* v. *Vaughan*, 199.

2. In the *complaint* filed the land was described as "adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres: *Held*, that the description in the complaint was too vague to be explained by parol testimony, and if the transcript was correctly copied in the complaint, the action might have been dismissed for failure to state facts sufficient to constitute a cause of action, or after the evidence was heard the jury might have been told that there was a fatal variance between the allegations and the proof. *Ibid.*

3. A deed that contains no descriptive word or phrase sufficient, with the aid of competent extrinsic testimony, to identify and

determine *all of its boundary lines*, will not pass any estate to the bargainee therein named. *Ibid.*

4. The rule that the descriptive words in the deed must. with the aid of the *evidence aliunde*, to which they *point*, identify the boundaries of the land conveyed, has been sanctioned by the Courts, not only upon the idea that there must be a certain subject-matter, but because its observance is essential to a proper enforcement of the statute of frauds. *Ibid.*

5. The sufficiency of descriptions in levies were made to depend, in some instances, upon the construction given by the Courts to the statute (Rev. Code, §16, ch. 62), prescribing what they should contain, and hence the Courts held descriptions in levies sufficiently definite that have been declared too vague in deeds of conveyance. *Ibid.*

6. Where two tracts of land were described in a Sheriff's deed as follows: "1st, a certain tract of land in aforesaid county, adjoining the lands of J. R. Conner and others, containing fifty acres, more or less; 2d, a certain tract of land in aforesaid county, adjoining the lands of J. B. Spivey and others, containing twenty-five acres, more or less": *Held*, that both descriptions were too vague and indefinite to be aided by parol proof. *Wilson* v. *Johnson*, 211.

7. Where the deed set forth that the bargainors, "for and in consideration of the sum of two thousand dollars to them in hand paid by J. W., doth give, grant, bargain, sell and convey all of the piece or parcel of land, or so much as our interest, lying and being," &c. (giving a description of the land), "to have and to hold all of our interest in the above-mentioned lot *from ourselves, our heirs* and all that may claim *under us* and our *assigns* forever, all that above-mentioned lot and premises": *Held*, that the bargainee took only a life-estate. *Anderson* v. *Logan*, 266.

DEPOSITIONS:

A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the Clerk, prescribed by *The Code*, §1357, or show facts that would amount to a waiver by the opposite party of the statutory requirement.

DISCRETION OF JUDGE, 440.

DIVORCE:

1. When, in an action for divorce *a mensa et thoro*, there was no evidence of turning *feme* plaintiff out of doors at any time

more than six months before the bringing of the action: *Held*, that the issue, "Did the defendant maliciously turn plaintiff out of doors?" was properly excluded. *Jackson* v. *Jackson*, 433.

2. It is not a sufficient compliance with the law, in such cases, to charge ill-treatment generally, or that the condition of *feme* plaintiff was intolerable by reason of her husband's conduct; the complaint ought to show the particulars of the ill-treatment, and that it was without provocation on her part. *Ibid.*

3. The complaint ought to show, and the Court, before granting such divorce, must see, either that the husband abandoned his family, or maliciously turned the plaintiff, his wife, out of doors, or endangered her life by cruel, torturous treatment, or offered such indignities to her person as rendered life a burden. *Ibid.*

4. Where, in such case, facts stated in the complaint were not sufficient to constitute a cause of action: *Held*, that a motion to dismiss, made for the first time in the Supreme Court, should be allowed. *Ibid.*

5. The defects in this case were such as might have been cured by amendment of the complaint, by leave of the Court, so as to correspond with the verdict and judgment. *Ibid.*

DOWER: See Husband and Wife.

EMINENT DOMAIN:

1. In special proceedings, pending before Clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the Clerk and transmitted to the Superior Court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. *Railroad* v. *Parker*, 246.

2. If the land-owner can even demand that an issue be found upon the question of damages in condemnation proceedings, previous to the appointment of commissioners, he cannot do so after the report of the commissioners and exceptions to it are filed. The Judge, then, has the power to order a new appraisement, to modify or confirm the report, but not to allow, on motion of one of the parties, in spite of the objection of the other, a trial of the issues by jury. *Ibid.*

ENTRIES AND GRANTS:

The certificate of the Clerk of the Court, required by *The Code* as a prerequisite to the registration of instruments of writing named therein. is not essential to the validity of the registration of a *grant;* the great seal of the State is sufficient authority for such registration. *Ray* v. *Stewart*, 472.

EQUITY:

In cases where the purchase-money for land is furnished by different persons, each holds an equitable interest in proportion to the amount of purchase-money paid by him, and the relative interests are not changed by the fact that one subsequently advances a sum for betterments placed on the land in excess of his proportional interest. *Thurber* v. *LaRoque*, 301.

EQUITABLE ASSIGNMENT: See ASSIGNMENT.

EQUITABLE LIEN: See MORTGAGE.

ESTOPPEL:

1. Where, in supplementary proceedings, the judgment creditors of R. sought to subject the amount recovered by R.'s receiver in suits against certain insurance companies on account of loss, by fire, of some tobacco, which loss was payable to one M.: *Held*, that where such suits were brought to determine the *liabilities of the insurance companies solely*, and the other questions were left to be determined by these proceedings, the finding of the Court in those suits that R. was the sole owner of the tobacco was not an estoppel upon M., who was resisting the claims of the judgment creditors. *Fertilizer Co.* v. *Reams*, 283.

2. The pendency of an appeal from a judgment of the Justice of the Peace upon the cause of action—the order of arrest having been discharged as void— is no bar to the maintenance of an action for unlawfully causing the arrest of an alleged debtor upon the void order of arrest. *Ibid.*

EVIDENCE:

1. In an action against the principal obligor in a bond executed prior to 1868, his admission that neither he nor his surety have paid the bond is sufficient to rebut the presumption of payment, nothing else appearing. *Cartwright* v. *Kerman*, 1.

2. If insolvency of the obligor is relied upon to rebut the presumption of payment arising from the lapse of time, it must be shown to have existed continuously during the entire statutory period. *Alston* v. *Hawkins*, 3.

3. The non-residence alone of the obligor is not sufficient to rebut the presumption of payment arising from the lapse of time, though evidence of that fact is competent in support of other

proof, such as insolvency, to rebut the presumption of payment. *Ibid.*

4. Where the defendant was a non-resident, and the only evidence of insolvency was a letter written by him to a person not in any way connected with the bond sued on, from which it appeared that he was in possession of considerable property, but in which he declared that he had his property so fixed that his creditors could not disturb it: *Held* not sufficient to rebut the presumption of payment. *Ibid.*

5. If *actual* payment is relied upon, the prohibition of the competency of parties in interest as witnesses does not apply, *aliter*, where the statute of *presumption* of payment is invoked. *Ibid.*

6. Upon the trial of an action involving the *bona fides* of a deed conveying land, it was in evidence that both parties claimed under one C.—the plaintiff through execution sale, the defendant by private sale. C. died pending suit, but his deposition, taken on behalf of the defendant, was, without objection of the plaintiff, admitted, in which he testified in relation to the circumstances of the alleged fraudulent sale and conveyance of defendant: *Held*, that, under the last clause of section 590, *The Code*, the defendant became a competent witness in his own behalf in respect to the same transaction. *Nixon* v. *McKinney*, 23.

7. While evidence of the intent of a party to a deed is never competent for the purpose of changing its obvious meaning or adding new provisions when its meaning is clear, nevertheless, where it is material to ascertain whether a grantor acted in good faith in executing a deed, or the motives of the grantee in taking benefit under it, the evidence of such grantor or grantee is competent upon the question of intent. *Ibid.*

8. Particular facts are inadmissible to prove general character. *Ibid.*

9. Parol evidence is not admissible to prove the terms of a verbal agreement to convey land, when the party against whom it is asserted denies its existence. *Fortescue* v. *Crawford*, 29.

10. Nor will a receipt containing no description of the land, but simply reciting that the money was the balance, or on account of land, be sufficient to admit parol evidence in support of the agreement. *Ibid.*

11. A survey and plat of the land, made under the direction of the alleged vendor, containing no reference to the receipt alleged to have been given for the purchase-money, will not be sufficient

to uphold the agreement; nor will parol evidence be received to connect it with such receipt. *Ibid.*

12. Formerly, all contracts, or memoranda purporting to be contracts, to convey lands, were required by *The Code*, § 1245, to be registered before they could be admitted in evidence. *Quere*, whether this requirement is dispensed with by ch. 147, Laws 1885. *Ibid.*

13. The refusal of the Court below to set aside a verdict on the ground that it was against the weight of the evidence cannot be reviewed on appeal. *Whitehurst* v. *Pettipher*, 40.

14. Whatever doubt may have been entertained as to the competency of tax-lists, this Court has decided that proof of listing land for taxation is admissible as an act done in pursuance of law, and under a claim of ownership, though of very slight import as evidence of title; but if the testimony had been admitted the plaintiffs would still have failed to make a *prima facie* case, and the error does not entitle them to a new trial. *Ruffin* v. *Overby*, 78.

15. The rules as to the *quantum* and quality of proof required in certain classes of cases laid down in *Harding* v. *Long*, 103 N. C., 1; *Brown* v. *Mitchell*, 102 N. C., 347; *Ely* v. *Early*, 94 N. C., 1, will be adhered to without modification. *Berry* v. *Hall*, 154.

16. Testimony that a person is sane or insane at the time of trial is competent as tending to show the condition of his mind at a previous period, when some act was done by him, the character or validity of which depended upon his mental capacity, and such evidence does not become incompetent by the mere lapse of time, but the evidence must be left to the jury to judge of its weight. *Ibid.*

17. A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the Clerk prescribed by *The Code*, § 1357, or show facts that would amount to a waiver by the opposite party of the statutory requirement. *Ibid.*

18. What effect is to be given to testimony competent in law to establish a fact must be left to the jury, but opinions of chancellors, when performing the functions of a jury, as well as a Judge, upon particular states of fact, must not be mistaken for rules of evidence and applied where the facts in evidence before a jury are analogous. This cannot be done without invading the province of the jury. *Ibid.*

19. The test of the admissibility of evidence *dehors* a deed is involved in the question whether it tends to explain some descriptive

word or expression contained in it, as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The rule is founded on the maxim, "*Id certum est quod certum reddi potest.*" *Blow* v. *Vaughan*, 199.

20. Proof that a tract of land, containing one hundred and twenty-five acres and belonging originally to John W. Blow, from whom the ancestor of plaintiffs claimed, was completely surrounded and bounded by the lands of the three persons named in the deed, will not identify the land which the deed purports to convey, because there is no testimony to show in what part of it the fifty acres is to be laid off. (*Hinton* v. *Roach*, 95 N. C., 106, overruled.) *Ibid.*

21. Where the defendant pleads in bar of an action that the whole cause of action alleged in the complaint has been the subject of arbitration, and the award performed, and also alleges in his answer that he never had notice of plaintiff's claim until after the arbitration: *Held*, that the answer did not admit that the plaintiff's claim had not been submitted to the arbitrators, and that it was competent for defendant to prove that it had been considered and was embraced in the award. *Cheatham* v. *Rowland*, 218.

22. A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his. *Helms* v. *Green*, 251.

23. It was this well-established rule of evidence that was laid down in *Reiger* v. *Davis*, 67 N. C., 189, but it was misconstrued and incorrectly stated in *Tredwell* v. *Graham*, 88 N. C., 208. *Ibid.*

24. In an action for false imprisonment, the defendant admitted by not denying in his answer, that the warrant of arrest under which the plaintiff was taken in custody was issued before action was begun by issuing summons: *Held*, that such admissions, in another action, should be taken as true, and any evidence admitted on that point was irrelevant. *Tucker* v. *Wilkins*, 272.

25. Evidence that defendant never made any demand for the debt upon which the warrant of arrest was issued, was competent to show the absence of probable cause and the animus of defendant in issuing the warrant. *Ibid.*

26. Mere general rumor that a person indebted has removed to another State is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. *Ibid.*

27. Where it is manifest upon reading the instrument alleged to be fraudulent, that though it was apparently executed with fraudulent intent, still some explanation might be given and a different purpose shown by *evidence aliunde*, the case belongs to the class that must be submitted to the jury to determine whether the presumption of fraud is rebutted; but where the facts set forth in the case agreed and apparent from reading the deed of assignment are not sufficient to raise a presumption of fraud, if the intent is not found as a part of the case agreed, then all of the circumstances should be left to the jury, without instruction as to their weight, to determine whether the fraud was proven to their satisfaction. *Bobbitt* v. *Rodwell*, 236.

28. Where a deed of trust contains no provision as to the terms of sale, or allows the trustee to sell on credit generally, without providing for unreasonable delay or specifying the length of credit to be given, it is not fraudulent in law, nor is there a presumption of fraud for that reason, but such general power to give credit is perfectly consistent with good faith, and falls so far short of raising a presumption of fraud, that it cannot be considered as even a badge of fraud. *Ibid.*

29. As between vendor and vendee of land, the intent of the owner of the land, when he placed the saw-mill, engine and boiler upon it, is not competent to vary the terms of the deed. *Horne* v. *Smith*, 322.

30. Failure to produce a note or paper on trial, which ought to have been produced, is a circumstance which the jury may consider in passing upon any alleged fact which would be made to appear or not appear by its production. *Reavis* v. *Orenshaw*, 369.

31. In an action to declare, among other things, a contract rescinded, plaintiffs proposed to show that defendants offered to compromise the matter; the defendants, without objection, had already testified that, after failing to make settlement with plaintiffs, they had offered to accept a sum by way of compromise: *Held*, that while, generally an offer of compromise is

incompetent evidence, inasmuch as it was irrelevant in this case, its admission could not prejudice defendants, and was harmless. *Ibid.*

32. Where it appears from the evidence that both plaintiffs wrote to one of the defendants and asked him not to ship certain machinery previously ordered and contracted for, and the machinery was not shipped, and there was also an offer by the plaintiffs to pay damages: *Held*, there was some evidence to go to the jury of a rescission of the contract. *Ibid.*

33. Declarations of grantor of delivery, being against his own interest, are admissible to show it. *Avent* v. *Arrington*, 377.

34. A wife of a deceased husband is a competent witness in an action effecting his estate, except as to transactions and communications between herself and him, though she be interested in the result of the suit. *Norris* v. *Stewart*, 455.

35. Objection to the introduction of such inhibited transactions and communications must be interposed when the witness is proceeding to testify. *Ibid.*

36. Evidence of general good character is not admissible as a defence against an allegation of *fraud*. *Ibid.*

37. It is essential that the character be put in issue by the nature of the action itself before such evidence is admissible. *Ibid.*

38. The presumption of death arises from the absence of a person for seven years without being heard from. *Dowd* v. *Watson*, 476.

39. It is error to exclude from the jury, in an issue upon the death of a person, evidence of *information* that he was alive, merely because it is *hearsay* testimony. *Ibid.*

40. Evidence that one is *acting* as president of a company is competent to show he *was* president. *Taylor* v. *Navigation Co.*, 484.

41. Where there was nothing in the contract to forbid *plaintiff* having another wharf, evidence of this was inadmissible. *Ibid.*

To rebut presumption of payment of bond. 278.

EXCEPTIONS:

1. The Court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction, or because complaint does not state a cause of action, or to the sufficiency of an indictment. Rule 27 and *Code*, § 550; *McKinnon* v. *Morrison*, 104 N. C., 354; *Taylor* v. *Plummer* and *Walker* v. *Scott*, at this term, cited and approved. *Whitehurst* v. *Pettipher*, 40.

2. When there is no exception taken except to the judgment, usually no case on appeal is necessary, and it is sufficient to file the exceptions thereto in ten days after judgment, as provided by Rule 27 of this Court. *Robeson* v. *Hodges*, 49.

3. Exceptions to a referee's report may be filed as a matter of right at the term to which the report is made. The filing of exceptions after that term is in the discretion of the Judge, and from the exercise of such discretion no appeal lies. *McNeill* v. *Hodges*, 52.

4. Where there are no exceptions stated in the case on appeal, and no errors appear upon the face of the record, the judgment must be affirmed. *Taylor* v. *Plummer*, 56.

5. The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to (*The Code*, § 412 (3)), but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal (*The Code*, § 550), and if this is not done, the exception is deemed waived. (Rule 27 (4).) *Ibid.*

FALSE IMPRISONMENT:

1. In an action for false imprisonment, the defendant admitted, by not denying in his answer, that the warrant of arrest under which the plaintiff was taken in custody was issued before action was begun by issuing summons: *Held*, that such admissions, in another action, should be taken as true, and any evidence admitted on that point was irrelevant. *Tucker* v. *Wilkins*, 272.

2. Evidence that defendant never made any demand for the debt upon which the warrant of arrest was issued, was competent to show the absence of probable cause and the animus of defendant in issuing the warrant. *Ibid.*

3. Mere general rumor that a person indebted has removed to another State is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. *Ibid.*

4. The pendency of an appeal from a judgment of the Justice of the Peace upon the cause of action—the order of arrest having been discharged as void—is no bar to the maintenance of an action for unlawfully causing the arrest of an alleged debtor upon the void order of arrest. *Ibid.*

FINDINGS OF FACT:

1. When, pursuant to the agreement of the parties, the Court finds the facts of a case, such findings are conclusive, subject to the exceptions—(1) that there was no evidence to support them; (2) that incompetent evidence was admitted: (3) or that some material fact or question was left out of consideration. *Fertilizer Co.* v. *Reams*, 283.
2. This Court will not review the finding of the Court below which was against the weight of the testimony. *Ibid.*
3. An exception that the Court refused to find certain specified facts is not sufficient. The Court must have failed or refused to *pass upon or consider* such facts or questions arising therefrom. *Ibid.*

FIXTURES:

1. Where it appeared that an engine and boiler were in a shed attached to a main building, connected with and used to operate a saw-mill, attached to the land in the usual way, the engine being supplied with water from a pond made for the purpose, the saw-mill, engine and boiler are fixtures, and pass by a deed to the land. *Horne* v. *Smith*, 322.
2. As between vendor and vendee of land, the intent of the owner of the land when he placed the saw-mill, engine and boiler upon it, is not competent to vary the terms of the deed. *Ibid.*

FORMER ACTION:

1. An unsatisfied judgment in an action of claim and delivery is no bar to a subsequent action between the same parties for damages for the conversion of the property in controversy. *Asher* v. *Reizenstein*, 213.
2. Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff in such action for damages for the conversion of the property: *Held*, that he was entitled to recover. *Ibid.*

FRAUDS, STATUTE OF, 29.

FRAUDULENT CONVEYANCE:

1. Where one purchases the land of an insolvent debtor, and a controversy ensues between the *creditors of the vendor* and *the vendee* as to the character and validity of the conveyance, the fact that an inadequate price was paid is a circumstance tending to show fraud, or a badge of fraud, that throws suspicion upon the transaction and calls for close scrutiny. *Berry* v. *Hall*, 154.

2. When *a grantor* seeks to set aside an executed conveyance on this ground, proof of even gross inadequacy of price, standing alone as a circumstance, in the absence of evidence of actual fraud or undue influence, is insufficient to warrant a decree declaring the conveyance void. *Ibid.*

3. Where, in addition to the admitted disparity between the price paid and the real value, there is conflicting evidence as to the mental capacity of the grantor, or her subjection to or freedom from some fraudulent and controlling influence, the inadequacy of price is a circumstance to be considered by the jury with all other testimony tending to show fraud, undue influence or want of capacity. *Ibid.*

4. If there be evidence tending to establish any fact that, if proven or admitted, would raise the presumption that the transaction was fraudulent, as alleged, the trial Judge may, of his own motion, and must, if requested in apt time, or if it be essential to a proper understanding of the application of the law to the testimony, instruct the jury as to its weight; but he is not at liberty to say to the jury that any fact, proved or admitted, that does not, in law, raise a presumption of the truth of the allegation of fraud, is a *strong circumstance tending to establish it.* *Ibid.*

5. Where it is manifest upon reading the instrument alleged to be fraudulent, that though it was apparently executed with fraudulent intent, still some explanation might be given and a different purpose shown by *evidence aliunde*, the case belongs to the class that must be submitted to the jury to determine whether the presumption of fraud is rebutted; but where the facts set forth in the case agreed and apparent from reading the deed of assignment are not sufficient to raise a presumption of fraud, if the intent is not found as a part of the case agreed, then all of the circumstances should be left to the jury, without instruction as to their weight, to determine whether the fraud was proven to their satisfaction. *Bobbitt* v. *Rodwell*, 236.

6. Where a deed of trust contains no provision as to the terms of sale, or allows the trustee to sell on credit generally, without providing for unreasonable delay or specifying the length of credit to be given, it is not fraudulent in law, nor is there a presumption of fraud for that reason, but such general power to give credit is perfectly consistent with good faith, and falls so far short of raising a presumption of fraud that it cannot be considered as even a badge of fraud. *Ibid.*

7. The fact that a debtor, in a deed of assignment, reserves to himself the personal property exemption allowed him by the Con-

stitution and laws of the State, does not affect the validity of the deed, and is no evidence of a fraudulent intent. It is not necessary, in this case, to decide whether the reservation in the deed of five hundred dollars of the money arising from the sale of property by the assignee would raise a presumption of fraudulent intent, and make, under the deed, as held by the Court below, fraudulent *per se*. *Ibid.*

8. The notorious insolvency of a bargainor in a deed executed to defraud his creditors is a circumstance tending to show that the bargainee, his son-in-law, who lived in the same neighborhood, participated in the fraud. *Helms* v. *Green*, 251.

9. Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under 13th Eliz. (*The Code*, §1545). as to his creditors. *Ibid.*

10. The fact that it is exclusively within the power of persons so nearly related (as the defendant in this case and his father-in-law, the grantor Hinson) to explain every suspicious circumstance, if they did act in good faith, and the neglect to do so voluntarily, or the failure of one of the parties, when he was forced to go upon the stand, to throw light upon it so as to fully establish, if their explanation were credited, the *bona fides* of the transaction, is to be considered as due to inability to show that their conduct was consistent with an honest purpose. *Ibid.*

11. The presumption arises rather from the peculiar knowledge on the part of parties to a deed that would either confirm or remove suspicion raised by circumstances in evidence as to the embarrassment of the grantor and his relationship to the grantee than from any positive testimony as to the persons actually present at the transaction. *Ibid.*

12. Badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party, as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not acceptable to his adversary. *Ibid.*

GRANTS: See Entries and Grants.

GUARANTY:

1. The contract of a guarantor is a separate and distinct obligation from that of the principal debtor, and it is immaterial that the

guaranty is written upon the same paper as the original obligation. His liability is not that of a surety. *Coleman* v. *Fuller*, 328.

2. An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. *Ibid.*

GUARDIAN AND WARD:

The Clerk has jurisdiction of a proceeding by a ward against his guardian for an account. *McNeill* v. *Hodges*, 52.

HOMESTEAD:

1. If the creditor is required to pay the costs of allotting any homestead in advance and of selling successively the excess, the reversion and the homestead itself, and incurs the risk of paying such expenses without reimbursement, if the proceeds of all do not pay his debt, the value of his debt is diminished by the sum total of such expense and by the decreased amount realized by selling the reversionary interest and homestead separately. *Long* v. *Walker*, 90.

2. It impairs the remedy and diminishes the value of the debt if neither the plaintiff in execution, nor any other person can cause the land to bring its value at sale without allotment of the homestead, and buy it without incurring the risk of having the validity of the sale successfully impeached after the lapse of years, by a finding of a jury that the land was worth over one thousand dollars when sold. *Ibid*

3. The value, in the year 1867, was the amount the land would bring under execution, and the purchaser at such a sale got a good title, unless fraud, such as preventing a fair competition of bidders, was shown, and the burden was then on one who attacked the sale for fraud to prove it, while under the principle laid down in *Morrison* v. *Watson* the burden would rest forever on a purchaser at a sale, without laying off a homestead, to show the true value of land bought to have been less than one thousand dollars, or have his deed declared invalid. *Ibid.*

4. After the decision in the case of *Edwards* v. *Kearsey* (96 U. S., 100), this Court and the Legislature of the State declared the Act of 1869 unconstitutional as to debts contracted before the 24th of April, 1868, and the liabilities of citizens were settled by the sale of land to satisfy debts created before that date without allotment of homsteads. *Ibid.*

5. The general policy of adhering to the last decision of a Court is subject to the limitation that inadvertent decisions must be overruled, unless they have been acted on for a long time, and property has been bought because of the public faith in the principle decided. *Ibid.*

6. Where the adjudications of a Court in construing a statute or the organic law seem to have been wrong originally, but have been recognized as authority for years, and titles to property have been accepted through faith in their stability, they become a sale of property, and ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute. *Ibid.*

7. Where a creditor, acting upon the principle laid down in *Morrison* v. *Watson* has caused the debtor's homestead to be laid off and sold, first the excess, then the reversionary interest in the homestead, and them the homestead itself, all such sales are valid. *Ibid.*

8. The case of *Morrison* v. *Watson*, 101 N. C., 332, is overruled, in so far as it declares a sale under execution to satisfy a debt arising out of a contract made before the 24th of April, 1868, void for failure to lay off the homestead of the debtor. *Ibid.*

HUSBAND AND WIFE: See also MARRIED WOMEN.

1. Prior to the present Constitution, a deed by husband to wife, founded on a valuable consideration, was upheld in equity. *Winborne* v. *Downing*, 20.

2. A deed which conveyed "to C. D. a certain parcel of land" (describing it) contained a clause as follows: "And I do further agree to warrant and defend the title of the same to her, the said C. D., her heirs or assigns forever," conveyed a fee-simple estate. *Ibid.*

3. Unless this construction is given, the words "to her heirs," and the term "forever." would be meaningless. *Ibid.*

4. Disorderly arrangement and punctuation may be disregarded when necessary to get the intention of the parties. *Ibid.*

5. Where a wife joined her husband in a mortgage conveying his land, together with personal property belonging to him, to secure his debt, and afterwards the husband alone executed a second mortgage conveying the same and other personal property to secure a second note executed by him, and before the personal property was sold directed that the proceeds of sale of the personal property, except so much as should arise from the sale of a mule and wagon (about which there was no direction), should be applied to the payment of the debt secured by the second mortgage: *Held*, that the fund arising from the sale of the mule and wagon should be paid upon the debt secured by the first mortgage, in exoneration of the wife's inchoate dower interest. *Gore* v. *Townsend*, 228.

6. The mortgagee cannot, because the husband failed to direct the application of the fund arising from the sale of the mule and wagon, apply it in discharge of the debt secured by the second mortgage, but must pay it on that secured by the first mortgage, for which the property is primarily liable, and in exoneration of the wife's dower. *Ibid.*

7. The inchoate right of the wife to dower in her husband's land, under *The Code*, ch. 53, has a present value as property depending on the ages, health and habits of both, and other circumstances competent to show the probabilities as to the length of life of each, and when she encumbers it by joining in a mortgage of his land to secure his debt she becomes his surety. *Ibid.*

8. The relationship between husband and wife is a sufficient consideration to raise this presumption, when the former furnishes the consideration and causes the conveyance to be made to the latter; but the presumption is repelled by proof that the deed was executed to defraud the husband's creditors, whose right to subject the interest resulting in favor of the husband is subject only to his right of homestead. *Thurber* v. *LaRoque*, 301.

9. Where the husband contracted to pay three hundred and fifty dollars for a tract of land, paid forty dollars and executed three notes, signed also by his wife, in the aggregate for three hundred and ten dollars, and caused a deed to be made for the whole to the wife, who immediately joined him in a mortgage deed to the grantor, reconveying the land to secure the payment of the notes, and she paid out of her own separate funds $150, and he $160, in addition to the $40 previously paid: *Held*, that the wife had the absolute title to three undivided sevenths, and held four undivided sevenths in trust for the husband, because he was embarrassed with debt, and that the right of the creditors was postponed only in favor of his right to a homestead. *Ibid.*

10. The land in this case will not be sold and the fund arising from the sale divided, because the husband expended over eight hundred, while the wife expended only two hundred in improvements placed on the land, after the purchase. *Ibid.*

11. The wife is not estopped, because of her silence while the improvements were being made, from denying that the creditors had a lien to the extent of the husband's expenditures for betterments, nor does the law imply a contract on her part to pay any portion of the costs of said improvements. *Ibid.*

12. The wife cannot subject her separate real estate, or any interest therein, to any lien, except by deed, in which the husband joins, with privy examination as prescribed by law, and she will not

be allowed to do indirectly what the law prohibits her from doing directly. *Ibid.*

13. The equitable interest of the husband, the resulting trust in four undivided sevenths, could not be sold to satisfy his creditors without allotting his homestead in it, if no homestead had been previously laid off to him, the debtor in such case being entitled to claim a homestead in the equity, as he may do where his deed conveying the legal, as well as equitable estate in the land, is set aside for fraud. *Ibid.*

Wife of deceased husband competent witness in an action affecting his estate, 455.

INJUNCTION:

In April, 1886, the plaintiff recovered and had docketed a judgment against P., who, prior to that date, had entered into a contract with S. for the purchase of certain lands, and had paid a portion of the purchase-money. In 1889, S , without the knowledge of plaintiff, recovered judgment against P. for balance of purchase-money and a decree to sell the land if the judgment was not paid by a certain day, and was proceeding to sell the land under the decree when the plaintiff brought an action to declare and enforce his lien, and for an injunction against sale pending that suit: *Held*, (1) that the plaintiff's action was properly brought, and that he could not have asserted his equity in the action between S. and P.; (2) that, under the circumstances, an injunction to the hearing was proper, particularly as the complaint alleged, and there was some evidence to prove, that the judgment for the balance of the purchase-money was collusive; (3) that the fact that plaintiff's debt had other securities did not prevent him from asserting his lien on the land. *Bost* v. *Lassiter*, 490.

INSOLVENCY:

When relied upon to rebut the presumption of payment, 3.

INSURANCE:

1. Where, in supplementary proceedings, the judgment creditors of R. sought to subject the amount recovered by R.'s receiver in suits against certain insurance companies on account of loss, by fire, of some tobacco, which loss was payable to one M.: *Held*, that where such suits were brought to determine the *liabilities of the insurance companies solely*, and the other questions were left to be determined by these proceedings, the finding of the Court in those suits that R. was the sole owner of the tobacco was not an estoppel upon M., who was resisting the claims of the judgment creditors. *Fertilizer Co.* v. *Reams*, 283.

2. If M. had no technical insurable interest, only the insurance companies could avail themselves of it as a defence on account of such contracts being against public policy. *Ibid.*

3. The plaintiffs (judgment creditors) having no lien on the tobacco and no interest in the insurance money recovered, must pursue their rights, if any, *in equity. Ibid.*

4. A contingent assignment of an insurance policy, with the subsequent assent of the company, makes a new and valid contract with the *assignee*, and puts the legal title to the amount of the loss in him, and he may sue for it in his own name. *Ibid.*

5. Even if the assignments of the insurance policies were made to secure indebtedness, they were not void as against plaintiffs for want of registration, where the assignor and assignee were partners. *Ibid.*

Action on policy of, 175.

INTENT:

While evidence of the intent of a party to a deed is never competent for the purpose of changing its obvious meaning, or adding new provisions when its meaning is clear, nevertheless, where it is material to ascertain whether a grantor acted in good faith in executing a deed, or the motives of the grantee in taking benefit under it, the evidence of such grantor or grantee is competent upon the question of intent. *Nixon* v. *McKinney*, 23.

INTER-STATE COMMERCE:

The rolling stock of a non-resident railroad corporation passing through the State for purposes of inter-State commerce is not liable to taxation in this State. *Bain* v. *Railroad*, 363.

ISSUES:

1. In an action to recover possession of land, the defendant set up a parol contract by the plaintiff to convey, which was denied: *Held*, that it was improper to submit to the jury an issue in respect to the making of such contract; and the only issues which ought to have been submitted were the amount of payments made by the vendee, and the value of the betterments placed by him on the property, and of the rents and profits with which he should be charged. *Fortescue* v. *Crawford*, 29.

2. In framing issues for the jury, it has been settled (1) that only issues of fact raised by the pleading must be submitted to the jury; (2) that the verdict, whether upon one or many issues, must establish facts sufficient to enable the Court to proceed to judgment; (3) of the issues raised by the pleadings, the Judge who tries the case may, in his discretion, submit one or many,

provided that neither party is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon. *McAdoo* v. *Railroad*, 140.

3. When, in an action for divorce *a mensa et thoro*, there was no evidence of turning *feme* plaintiff out of doors at any time more than six months before the bringing of the action: *Held*, that the issue, "Did the defendant maliciously turn plaintiff out of doors?" was properly excluded. *Jackson* v. *Jackson*, 433.

JUDGE'S CHARGE:

1. Where, upon an issue of damages for advertising for sale land embraced in a deed of trust securing a contract which had been rescinded, there was no evidence to go to the jury by which to determine the amount of damages: *Held*, that the charge of the Court that "if the jury shall decide that plaintiff is entitled to damages, the measure of his damages will be his loss resulting from inability to sell his land," etc., was error, and entitles defendant to a new trial. *Reavis* v. *Orenshaw*, 369.

2. Where the only evidence affecting the *bona fides* of the *endorsement* of a note was that, at the time of the *execution*, there were some facts that might have indicated fraud on the part of the *payee*: *Held*, that the plaintiff (endorsee) was entitled to the instruction that there was no sufficient evidence to go to the jury that the plaintiff was not the owner of the note, and that a failure on the part of the Court below to give this instruction, when asked, entitled the plaintiff to a new trial. *Applegarth* v. *Tillery*, 407.

JUDGMENT:

1. A judgment can be rendered in favor of one co-defendant against another. *McNeill* v. *Hodges*, 52.

2. A party can recover judgment for any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not. *Ibid.*

3. Where a final judgment or decree has been rendered in a cause, and it is sought to impeach it for fraud, or for serious irregularity, in the proceedings, not apparent in the record, the remedy is by a new and independent action, and not by a motion in the original cause. *Smith* v. *Fort*, 446.

4. Where a motion in a cause which had been terminated by final judgment was made upon notice to the parties and supported by the affidavits, but no pleadings had been filed. or issues joined, or any consent entered to treat the motion as an independent action, it was error in the Court, of its own motion, and in its discretion, to so consider and dispose of it, and the Supreme Court will, *ex mero motu*, correct such error. *Ibid.*

5. Where the jury rendered their verdict for the plaintiff, and thereupon the Court, before rendering judgment upon the verdict, made an order of reference for an account between the parties to ascertain the balance due, to which no exception was made, but defendant appealed: *Held*, that such appeal must be dismissed as premature. *Blackwell* v. *McCaine*, 460.

6. When the Court below enters interlocutory judgments or orders, exceptions taken thereto cannot, generally, be brought up for review until after final judgment. *Ibid.*

7. When appellant is not seriously prejudiced by delay, and not deprived of any substantial right by the rendition of an interlocutory judgment, &c., the regular and orderly method of procedure is to except and proceed to final judgment, so that the appeal may bring up the whole case at once. *Ibid.*

JUDGMENTS, Alternative, 59.

JURISDICTION:

1. Where a complaint, in an action begun before the Clerk, as Probate Court, states matters properly triable in that Court, an amendment cannot be allowed in the Superior Court engrafting matters of which the latter Court alone has jurisdiction. *Robeson* v. *Hodges*, 49.

2. When, without amendment in such case, matters are investigated without objection, of which the Superior Court alone had jurisdiction, and judgment is rendered thereon, the implied consent does not confer jurisdiction, and advantage can be taken of the defect in this Court. *Ibid.*

3. The Clerk has jurisdiction of a proceeding by a ward against his guardian for an account. *McNeill* v. *Hodges*, 52.

4. A Justice of the Peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. *Hodges* v. *Hill*, 130.

5. The Superior Court has jurisdiction of an action for damages for the conversion of property where the amount claimed is one hundred and twenty-five dollars. *Asher* v. *Reizenstein*, 213.

JURY:

What effect is to be given to testimony competent in law to establish a fact must be left to the jury, but opinions of chancellors, when performing the functions of a jury, as well as a Judge, upon particular states of fact, must not be mistaken for rules of evidence and applied where the facts in evidence before a jury are analogous. This cannot be done without invading the province of the jury. *Berry* v. *Hall*, 154.

JURY TRIAL:

1. The Constitution (Art. I, § 19) guarantees the right to trial by jury, in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found could not have been refused; and in fixing the question of compensation to the land-owner for right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged exclusively and peculiarly to the jury. *Railroad* v. *Parker*, 246.
2. In special proceedings, pending before Clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the Clerk and transmitted to the Superior Court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. *Ibid.*
3. If the land-owner can even demand that an issue be found upon the question of damages in condemnation proceedings, previous to the appointment of commissioners, he cannot do so after the report of the commissioners and exceptions to it are filed. The Judge, then, has the power to order a new appraisement, to modify or confirm the report, but not to allow, on motion of one of the parties, in spite of the objection of the other, a trial of the issues by jury. *Ibid.*

JUSTICE OF THE PEACE:

A Justice of the Peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. *Hodges* v. *Hill*, 130.

LANDLORD'S LIEN: See LIEN.

LIEN:

1. In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale, which was made to third parties, and agreed to accept three notes secured by a second mortgage on the vessel as security: *Held*, such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. *Kornegay* v. *Styron*, 14.
2. The fact that the notes and mortgage were never, in fact, executed pursuant to agreement does not vitiate the waiver, it not appearing that their execution was a condition precedent thereto. *Ibid.*

3. One C., as executor, recovered judgment against the defendant on a debt due to his testator by contract before the year 1867, and caused execution to issue. The defendant paid to the Sheriff the principal and interest of the judgment, and took his receipt therefor (not including costs). The Sheriff sold the land of defendant, already levied on to satisfy the costs, at which sale plaintiff bought. and brings this action to recover possession: *Held*, that the right to recover disbursements, in case of default in payment, being secured by law, when the contract was made, entered into and formed a part of it, and such costs as incidents of the judgment constitute a lien upon the same property, and to the same extent, as the principal and interest of the debt. *Long* v. *Walker*, 90.

4. This lien exists in favor of the officers of the Court when they do not require the plaintiff, as they have a right to do, to pay their fees in advance. In such instances the officers (Sheriff and Clerk of the Court) have the right of retainer to the extent of the costs out of the amount collected, and neither can be compelled to look exclusively to the plaintiff's prosecution bond, nor prevented from exhausting his remedy against the debtor, by reason of any receipt or compromise between the judgment creditor and debtor. *Ibid.*

5. The receipt given in this case did not operate, like the receipt of principal and interest of a debt. while suit is pending for its collection, to extinguish plaintiff's claim against defendant for the costs incident to the action, in the absence of some special agreement to the contrary. *Ibid.*

6. If the sale of defendant's land under the execution would have been valid without allotting him a homestead thereon, when the principal and interest of the debt had not been paid, the estate of the debtor passed to the plaintiff under the sale to satisfy the costs due by virtue of the execution. *Ibid.*

7. The defendant, a landlord, on January 1, 1887, rented out certain lands belonging to him, and rented other lands from one W., who advanced supplies to him and sold him a mule, retaining title verbally as security for the purchase-money. In January and July following, defendant made agricultural liens to plaintiffs, and, from time to time, received advancements thereon to both his own and his tenant's crops: *Held*—(1) that W. had a prior lien to plaintiffs for supplies advanced; (2) that, as it did not appear that the mule was a part of such supplies, there was a prior lien on the crops as to it, and W. could not retain the crops for its purchase-money; 3) The use of the mule in the cultivation of the crops did not necessarily make it an advancement. *Branch* v. *Galloway*, 193.

8. Where a contemporaneous mortgage is given to secure a note for 595 pounds of cotton, dated April 30th, 1887, and payable October 1st, 1887, conveying "all of my entire crop to be made on my lands in Averasboro Township, Harnett County," it is unmistakable that the mortgage referred to and conveyed the crop of 1887. *Taylor* v. *Hodges*, 344.

9. In such case the defendant was not injured, and cannot complain that on the trial incompetent testimony was allowed to go to the jury to show "that crop" was intended to be conveyed. *Ibid.*

10. In April, 1886, the plaintiff recovered and had docketed a judgment against P., who, prior to that date, had entered into a contract with S. for the purchase of certain lands, and had paid a portion of the purchase-money. In 1889, S., without the knowledge of plaintiff, recovered the judgment against P. for balance of purchase-money, and a decree to sell the land if the judgment was not paid by a certain day, and was proceeding to sell the land under the decree when the plaintiff brought an action to declare and enforce his lien, and for an injunction against sale pending that suit: *Held*, (1) that the plaintiff's action was properly brought, and that he could not have asserted his equity in the action between S. and P.; (2) that under the circumstances, an injunction to the hearing was proper, particularly as the complaint alleged, and there was some evidence to prove, that the judgment for the balance of the purchase-money was collusive; (3) that the fact that plaintiff's debt had other securities, did not prevent him from asserting his lien on the land. *Bost* v. *Lassiter*, 490.

LIMITATIONS, STATUTE OF:

An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. *Coleman* v. *Fuller*, 328.

Plea of by heir, in proceedings to make real estate assets, 222.

MARRIED WOMAN: See also HUSBAND AND WIFE.

A Justice of the Peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. *Hodge* v. *Hill*, 130.

MEASURE OF DAMAGES, 369.

MISJOINDER OF ACTION, 170.

MORTGAGE:

1. When B. made a mortgage to W. to secure the indebtedness of a firm at and after a certain time, and also before that time, there

was other indebtedness due by the firm to W., upon all of which usurious interests had been charged: *It was held*, that B. could not be allowed a rebate for usury, so charged before she made the mortgage. *Burwell* v. *Burgwyn*, 498.

2. She could only be affected by usurious interest charged after she became liable for the debts of the firm, and then only to the extent of her liability. *Ibid.*

3. Where the usurious interest is reduced to and included in a judgment, the judgment cannot be impeached as to that part, but is valid as a whole. *Ibid.*

4. The proceeds of sale of B.'s mortgaged land must be applied to the discharge of the mortgage debt rendered to judgment, without regard to the fact that a part of it is usurious. *Ibid.*

5. Where a wife joined her husband in a mortgage conveying his land, together with personal property belonging to him, to secure his debt, and afterwards the husband alone executed a second mortgage conveying the same and other personal property to secure a second note executed by him, and, before the personal property was sold, directed that the proceeds of sale of the personal property, except so much as should arise from the sale of a mule and wagon (about which there was no direction), should be applied to the payment of the debt secured by the second mortgage: *Held*, that the fund arising from the sale of the mule and wagon should be paid upon the debt secured by the first mortgage in exoneration of the wife's inchoate dower interest. *Gore* v. *Townsend*, 228.

6. The mortgagee cannot, because the husband failed to direct the application of the fund arising from the sale of the mule and wagon, apply it in discharge of the debt secured by the second mortgage, but must pay it on that secured by the first mortgage, for which the property is primarily liable, and in exoneration of the wife's dower. *Ibid.*

7. The inchoate right of the wife to dower in her husband's land, under *The Code*, ch. 53, has a present value as property depending on the ages, health and habits of both, and other circumstances competent to show the probabilities as to the length of life of each, and when she encumbers it by joining in a mortgage of his land to secure his debt, she becomes his surety. *Ibid.*

8. Where a contemporaneous mortgage is given to secure a note for 595 pounds of cotton, dated April 30, 1887, and payable October 1, 1887, conveying "all of my entire crop to be made on my lands in Averasboro township, Harnett County," it is unmis-

takable that the mortgage referred to and conveyed the crop of 1887. *Taylor* v. *Hodges*, 344.

9. In such case, the defendant was not injured and cannot complain that, on the trial, incompetent testimony was allowed to go to the jury to show "that crop" was intended to be conveyed. *Ibid.*

10. Where a debtor notifies a creditor that he will not pay a debt due him, the law does not require the latter to make demand before bringing suit. *Ibid.*

11. Where, in an action of claim and delivery, the plaintiff, claiming a mortgage lien, seized, and the defendant replevied, $223.50 worth of property, and, on the trial, the plaintiff recovered judgment for $50.37, the proper judgment to be entered is, "that plaintiff recover the specific property, and if possession cannot be had, then the penal sum named in the bond of the defendant and his sureties, with a *proviso* that the specific property shall be relieved of the lien and liability to seizure and sale and the defendant and the sureties on his bond discharged by the payment of $50.37, with interest from the beginning of the term, and costs." *Ibid.*

12. A deed, absolute upon its face, may be treated as a mortgage, when it was agreed, *at the time of its execution*, that such should be its purpose. But the proof of this should be strong and satisfactory. *Waters* v. *Crabtree*, 394.

13. But if the purpose of the deed was to operate as a mortgage, it cannot have that effect against subsequent *bona fide* purchasers for value and without notice. *Ibid.*

14. When such contemporaneous agreement is afterwards reduced to writing, it relates back to the execution of the deed. *Ibid.*

15. When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed: *Held*, that subsequent purchasers for value, without *actual* notice, whose deeds were duly recorded, were not affected with notice of such registration. *Ibid.*

16. Nor can re-registration of the defeasance in 1886, after the registration of the *mesne* conveyances to the innocent purchasers, avail to defeat their rights. *Ibid.*

17. The words "we promise to pay to L. & B., out of the proceeds of certain railroad ties we have now in Hertford County, amounting to forty-two hundred, the sum of a hundred and thirty-two dollars, * * * and authorize the purchaser to retain that

amount for them," contained in a promissory note, are not sufficient to constitute it a chattel mortgage or an equitable lien, though duly proved and registered. *Britt* v. *Harrell*, 10.

18. Nor is such instrument a sufficient equitable assignment of the ties or the proceeds thereof, to the payment of the debt. *Ibid.*

19. In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties, and agreed to accept three notes secured by a second mortgage on the vessel as security: *Held*, such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. *Kornegay* v. *Styron*, 14.

20. The fact that the notes and mortgage were never, in fact, executed pursuant to agreement does not vitiate the waiver, it not appearing that their execution was a condition precedent thereto. *Ibid.*

21. When a mortgage is acknowledged, and wife's privy examination taken before a Justice of the Peace, but the adjudication that the same is in due form and the order of registration is made by a Clerk of the Superior Court, who is the mortgagee therein, the adjudication and order by the Clerk, and the registration thereunder, are void. *Turner* v. *Connelly*, 72.

22. Any conveyance or mortgage of its property executed by any corporation is void and of no effect as to the creditors of said corporation existing at the time of the execution of said deed or mortgage, and who shall commence proceedings to enforce their claims against the corporation within sixty days after registration of the conveyance. *Duke* v. *Markham*, 138.

23. A deed absolute on its face, but intended as a mortgage, cannot operate as such unless it is alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. *Green* v. *Sherrod*, 197.

By corporation, when valid, 131.

MOTION TO RETAX BILL OF COSTS, 167.

NEGLIGENCE: See also DAMAGES:

1. Where plaintiff alleged in his complaint that he was returning from his place of business to his home, along defendant's track, "as he had been in the habit of doing for several years, without objection from the defendant, within the corporate limits of the town of Greensboro, *when, owing to the gross negligence of the*

defendant's servants, he was struck from behind by a locomotive engine, belonging to the defendant, &c., and thrown from the track, was thereby much injured," and the jury, in response to the first issue, found that the plaintiff was "injured by the negligence of the defendant, *as alleged*": *Held*, that the verdict meant only that the defendant, by failure to exercise ordinary care, injured the plaintiff. *McAdoo* v. *Railroad*, 140.

2. When, in such case, in answer to a second issue, the jury found also that the plaintiff, by his own concurrent negligence, contributed to cause the injury: *Held*, that the plaintiff was not entitled to judgment upon the whole verdict. *Ibid.*

3. It is not error, even when contributory negligence is pleaded, since the enactment of chapter 33, Laws of 1887, to submit only the question whether the injury was caused by the defendant's negligence and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. *Ibid.*

4. When contributory negligence is pleaded, the jury can ordinarily be made to comprehend the law more clearly if not only the issues involving the question of negligence of plaintiff and defendant, respectively, are submitted; but another involving the question, where it is raised by the evidence or the discussion, whether, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care, have avoided the injury. *Ibid.*

5. When a person is about to cross the track of a railroad, even at a regular crossing, it his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass over, injures him. *Ibid.*

6. Where one is not a trespasser in using the track as a foot-way, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. *Ibid.*

7. Where the servant, who is running an engine, sees another standing on the track in front of him whom he does not know at all, or who is known by him to have ordinary intelligence and full possession of all his senses, the former is not required to stop his engine, but may assume that the latter will step off the track. *Ibid.*

8. Where the plaintiff, being in full possession of his senses, stood upon the track in a town till the defendant's engine ran against

and injured him, and did not, according to his own evidence, know of its approach till he was knocked off the track, the jury properly found that he was negligent, and would not have been warranted in finding that the defendant, by the use of ordinary care, could have avoided the injury. *Ibid.*

9. In an action against a railroad company for the destruction of a portable steam-engine, which had stalled on a crossing, it appeared that the driver, on seeing a train turn a curve about one thousand yards distant, ran up the track, waving a handkerchief, and that the engineer made no effort to stop the train until within about three hundred yards of the crossing, although he noticed the driver waving his handkerchief as soon as he turned the curve, and his fireman called his attention to the obstruction when he was about six hundred yards from the crossing: *Held*, that the engineer was negligent, if, by watchfulness, he could have seen that the road was obstructed in time to stop his train before reaching the crossing. *Bullock* v. *Railroad*, 180.

10. Where it appeared that plaintiff's driver went on the track to see whether any train was approaching before he attempted to cross, the fact that he did not examine the crossing and that he did not look at his watch to see whether it was about train time, does not constitute such contributory negligence as will prevent plaintiff from recovering, it appearing that the stalling would not have occurred if the crossing had been in good condition. *Ibid.*

NONSUIT:

When no counter-claim is pleaded, a plaintiff has the right to take a nonsuit at any time before verdict or final judgment. An interlocutory judgment does not deprive a plaintiff of the right to take a nonsuit. *Mf'g Co.* v. *Buxton*, 74.

NON-RESIDENT:

Non-residence alone is not sufficient to rebut the presumption of payment, 3.

NOTICE:

1. A partner retiring from the partnership, in order to relieve himself from further liabilities must bring actual notice of such retirement and of such dissolution of the partnership home to such persons as have been accustomed to deal with it. *Ellison* v. *Sexton*, 356.

2. As to persons having knowledge of the firm before its dissolution, but not having dealt with it, general public notice of the dissolution, given in any reasonable way, will be sufficient. *Ibid.*

3. A single publication of a notice of dissolution, in a paper published in the place where the firm did business, and having a a large local circulation, is not sufficient. *Ibid.*

Possession under color of title works notice to purchasers, 377.

When purchaser for value not affected with notice, 394.

OFFICIAL BOND: See BOND, OFFICIAL.

OVERRULED CASES:

1. The case of *Morrison* v. *Watson*, 101 N. C., 332, is overruled in so far as it declares a sale under execution to satisfy a debt arising out of contract made before the 24th of April, 1868, void, for failure to lay off the homestead of the debtor. *Long* v. *Walker*, 90.

2. This case involves the principle decided in *Long* v. *Walker*, *ante*, in overruling *Morrison* v. *Watson*, 101 N. C., 332. *Shaffer* v. *Hahn*, 121.

Hinton v. *Roach*, 95 N. C., 106.

PARTITION:

Where a testator devised certain real estate to his wife for life or widowhood, and, after her death, to his three daughters· naming them, "as long as they wished to keep house together," providing for sale and division among "his children and their heirs," if they (his daughters) "should marry or wish to quit keeping house," and one of the daughters, the others being dead, was stilling keeping house on the land: *Held*, the land was not subject, during her life, to partition among the heirs. *Hays* v. *Davis*, 482.

PARTNERS AND PARTNERSHIPS:

1. A partner retiring from the partnership, in order to relieve himself from further liabilities must bring actual notice of such retirement and of such dissolution of the partnership home to such persons as have been accustomed to deal with it. *Ellison* v. *Sexton*, 356.

2. As to persons having knowledge of the firm before its dissolution, but not having dealt with it, general public notice of the dissolution, given in any reasonable way, will be sufficient. *Ibid.*

3. A single publication of a notice of dissolution, in a paper published in the place where the firm did business, and having a large local circulation, is not sufficient. *Ibid.*

PAYMENT: See also PRESUMPTION OF PAYMENT.

When admission of obligor in bond sufficient to rebut presumption of payment. *Ibid.*

PETITION TO REHEAR:

1. The decision in *Emry* v. *Railroad*, 104 N. C., reaffirmed.
2. The Court reiterates that it will rehear a case only for weighty considerations, and when the alleged error clearly appears. *Emry* v. *Railroad*, 45.
3. Where the plaintiff, in an action to recover land, demands judgment in his complaint for a tract containing twenty-five acres, and the following issue is submitted to the jury, "Is plaintiff the owner of the land described in the complaint?" to which the jury respond, "Yes; one-seventh of the Sandy Bottom tract—160 acres": *Held*, that the verdict is contradictory and a new trial will be ordered. *Allen* v. *Sallinger*, 333.

PETITION TO MAKE REAL ESTATE ASSETS: See ASSETS, PETITION TO MAKE.

PLEADING:

1. It is not error, even when contributory negligence is pleaded, since the enactment of chapter 33, Laws of 1887, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. *McAdoo* v. *Railroad*, 140.
2. When contributory negligence is pleaded, the jury can ordinarily be made to comprehend the law more clearly if not only the issues involving the question of negligence of plaintiff and defendant, respectively, are submitted, but another involving the question, where it is raised by the evidence or the discussion, whether, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care, have avoided the injury. *Ibid.*
3. Plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by the road-bed erected by defendant ponding water back on plaintiff's land; the other to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by *The Code*, § 1975, whereby cattle trespassed upon plaintiff's enclosed lands and crops. On demurrer held an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty, and the action should be divided. *Hodges* v. *Railroad*, 170.
4. In an action on a policy of insurance a copy of the application need not be set out in the complaint. *Britt* v. *Insurance Co.*, 175.

5. An award duly made upon an arbitration, and performed, constitutes a good plea in bar to a subsequent action for the same cause. *Cheatham* v. *Rowland*, 218.

6. In a proceeding by an administrator to sell the lands of his intestate to make assets, the heir can plead the statute of limitations to such claims of creditors as have not been reduced to judgment against the administrator. The heir is bound by such judgment, unless he can show that it was obtained by collusive fraud. *Proctor* v. *Proctor*, 222.

7. Where in such proceeding the defendant (heir) pleaded that "if there is any indebtedness outstanding against the estate of plaintiff's intestate, the same is barred by the statute of limitations" (*The Code*, §153, par. 2), "and the said statute of limitations is hereby pleaded against the collection of said claims: *Held*, that although the plea is indefinite and unsatisfactory, it was the duty of the Court below to have considered and determined it, and a failure to do so is error. *Ibid.*

8. In actions for the recovery of land, as formerly in the action of ejectment, any deed offered as a link in a chain of title is thereby exposed to attack for incapacity in the maker, or because it was void under the statutes of frauds (13th and 27th Eliz.), though it may not have been mentioned in the pleadings; but where a party seeks to set aside a conveyance because of a fraudulent combination to prevent a fair competition of bidders, he must allege the fraud now as he was required formerly to file his bill in a Court of Equity. *Helms* v. *Green*, 251.

9. *The Code*, §579, abolishes the action to obtain discovery under oath, and substitutes for it a remedy in harmony with the code system by allowing a party, in support of the allegations of his complaint, or of a cross-action set up in a counter-claim, after eliciting admissions from his adversary by verifying his pleadings, to examine such adversary party, as to facts within his peculiar knowledge, both before and at the trial of the action. *Ibid.*

10. The facts relied upon as the basis of a defence or counter-claim must be set out in an answer with the same precision as is requisite in a complaint, and, therefore, a defendant who expects to prove that there was an actual mistake by which the word "heirs" was omitted from a deed which he proposes to offer in evidence, or to insist that there is internal evidence in such deed that the grantor intended to convey the fee and omitted the word of inheritance by mistake, must set up his equity in his answer. *Anderson* v. *Logan*, 266.

11. It is not a sufficient compliance with the law, in an action for divorce *a mensa et thoro*, to charge ill treatment generally, or that the condition of the *feme* plaintiff was intolerable by reason of her husband's conduct. The complaint ought to show the particulars of the ill treatment, and that it was without provocation on her part. *Jackson* v. *Jackson*, 433.

12. The complaint ought to show, and the Court, before granting such divorce, must see, either that the husband abandoned his family or maliciously turned the plaintiff, his wife, out of doors, or endangered her life by cruel, torturous treatment, or offered such indignities to her person as rendered life a burden. *Ibid.*

13. Where, in such case, facts stated in the complaint were not sufficient to constitute a cause of action: *Held*, that a motion to dismiss, made for the first time in the Supreme Court, should be allowed. *Ibid.*

14. The defects in this case were such as might have been cured by amendment of the complaint, by leave of the Court, so as to correspond with the verdict and judgment. *Ibid.*

POWER OF DEVISEE TO CHARGE ESTATE, 350.

PRACTICE:

1. In an action for trespass for wrongful entry on land and cutting timber, where the defendants filed a counter-claim, alleging that the plaintiffs had wrongfully raised a dam and ponded water back on defendant's land, which was part of the land described in the complaint as that on which the alleged trespass had been committed: *Held*, that the counter-claim was not connected with cause of action, and that a demurrer thereto was properly sustained. *Bazemore* v. *Bridgers*, 191.

2. An appeal from a judgment sustaining such demurrer is premature. *Ibid.*

3. An appellee may serve a "counter-case" to the "case on appeal," served by the appellant, instead of specific exceptions. *Horne* v. *Smith*, 322.

4. Where the plaintiff, in an action to recover land, demands judgment in his complaint for a tract containing twenty-five acres, and the following issue is submitted to the jury, "Is plaintiff the owner of the land described in the complaint?" to which the jury responded, "Yes; one-seventh of the Sandy Bottom tract—160 acres": *Held*, that the verdict is contradictory and a new trial will be ordered. *Allen* v. *Sallinger*, 333.

5. Where a debtor notifies a creditor that he will not pay a debt due him, the law does not require the latter to make demand before bringing suit. *Taylor* v. *Hodges*, 344.

6. Where, in an action of claim and delivery, the plaintiff, claiming a mortgage lien, seized, and the defendant replevied, $223.50 worth of property, and on the trial the plaintiff recovered judgment for $50.37, the proper judgment to be entered is "that plaintiff recover the specific property, and if possession cannot be had, then the penal sum named in the bond of the defendant and his sureties, with a proviso that the specific property shall be relieved of the lien and liability to seizure and sale, and the defendant and the sureties on his bond discharged by the payment of $50.37, with interest from the beginning of the term and costs." *Ibid.*

7. Where a final judgment or decree has been rendered in a cause, and it is sought to impeach it for fraud, or for serious irregularity in the proceedings, not apparent in the record, the remedy is by a new and independent action, and not by a motion in the original cause. *Smith* v. *Fort*, 446.

8. Where a motion in a cause, which had been terminated by final judgment, was made, upon notice to the parties and supported by the affidavits, but no pleadings had been filed, or issues joined, or any consent entered to treat the motion as an independent action, it was error in the Court, of its own motion, and in its discretion, to so consider and dispose of it, and the Supreme Court will *ex mero motu* correct such error. *Ibid.*

PRAYER FOR RELIEF:

A party can recover judgment for any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not. *McNeill* v. *Hodges*, 52.

PROBATE AND REGISTRATION OF DEED:

1. When the Clerk of the Superior Court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution, and privy examination of a married woman by a Justice of the Peace, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function, which cannot be delegated to a deputy, nor exercised by the Clerk as to an instrument to which he is a party. *White* v. *Connelly*, 65.

2. Hence, when the Clerk, who is the grantor in a deed of trust, acknowledges the execution of the same before a Justice of the Peace, who also takes the privy examination of grantor's wife, and the Clerk adjudges the certificate made by the Justice of such acknowledgment and privy examination to be in due form, admits the instrument to probate and orders registration: *Held*, that such registration is without legal warrant, and invalid as to third parties. *Ibid*

3. When a mortgage is acknowledged, and wife's privy examination taken before a Justice of the Peace, but the adjudication that the same is in due form and the order of registration is made by a Clerk of the Superior Court, who is the mortgagee therein, the adjudication and order by the Clerk, and the registration thereunder, are void. *Turner* v. *Connelly*, 72.

4. When a certificate of probate is not sufficient to entitle the instrument to registration, if a party make it part of his pleading he waives the question of its admissibility. *Avent* v. *Arrington*, 377.

5. So, likewise, defendant's admission that a paper-writing in question is the one attached as an exhibit in the pleadings relieves the plaintiff of proving its contents, but its delivery and sealing may still be disputed. *Ibid.*

6. Where a deed is proved and registered, there is a presumption of *proper* delivery, nothing more appearing. *Ibid.*

7. Where plaintiff had notice of the registration of the *mesne* conveyances, and of possession of defendants under them for fifteen years, and all this time, and for eight years after paying the debt secured by the deed, he failed to register the defeasance or assert his claim: *Held*, he was guilty of gross negligence and not entitled to the relief of a Court of Equity. *Waters* v. *Crabtree*, 394.

8. Before the Act of 1883, there was no law in this State requiring the registration of a conditional sale. *Perry* v. *Young*, 463.

9. Where, under the law as it then stood, A sold a mule to B, and, in writing, retained title as security for the purchase-money unpaid, and then afterwards (but before the Act of 1883) allowed B to exchange his mule for a horse, under a verbal agreement that he should stand in the place of the mule: *Held*, (1) that both transactions were conditional sales, valid at that time without registration; (2) that subsequent innocent purchasers, for value, of the horse from B could not maintain title against A—the doctrine of *caveat emptor* applying. *Ibid.*

10. The certificate of the Clerk of the Court, required by *The Code* as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a *grant;* the great seal of the State is sufficient authority for such registration. *Ray* v. *Stewart*, 472.

11. A contract whereby one *grants* to a company the right for ten years to land and receive all freights for a certain town amounts to more than a license. *Taylor* v. *Navigation Co.*, 484.

12. Taking this to be a mere right-of-way, it falls within the statute allowing registration (*The Code*, § 1264), in that it purports to convey an "interest in or concerning land." *Ibid.*

Registration of mortgage by corporation, 131, 138.

PRESUMPTION OF DEATH:

1. The presumption of death arises from the absence of a person for seven years without being heard from. *Dowd* v. *Watson*, 476.

2. It is error to exclude from the jury, in an issue upon the death of a person, evidence of *information* that he was alive, merely because it is *hearsay* testimony. *Ibid.*

PRESUMPTION OF PAYMENT:

1. In an action against the principal obligor in a bond executed prior to 1868, his admission that neither he nor his surety have paid the bond is sufficient to rebut the presumption of payment, nothing else appearing. *Cartwright* v. *Kerman*, 1.

2. If insolvency of the obligor is relied upon to rebut the presumption of payment arising from the lapse of time, it must be shown to have existed continuously during the entire statutory period. *Alston* v. *Hawkins*, 3.

3. The non-residence alone of the obligor is not sufficient to rebut the presumption of payment arising from the lapse of time, though evidence of that fact is competent in support of other proof, such as insolvency, to rebut the presumption of payment. *Ibid.*

4. Where the defendant was a non-resident, and the only evidence of insolvency was a letter written by him to a person not in any way connected with the bond sued on, from which it appeared that he was in possession of considerable property, but in which he declared that he had his property so fixed that his creditors could not disturb it: *Held*, not sufficient to rebut the presumption of payment. *Ibid.*

5. If *actual* payment is relied upon, the prohibition of the competency of parties in interest as witnesses does not apply, *aliter*, where the statute of *presumption* of payment is invoked. *Ibid.*

6. Where a single bond was executed in 1860, and more than ten years, exclusive of time between May, 1861, and January, 1870, had elapsed before the bringing of an action upon it, there is a presumption of payment or satisfaction thereof. *Grant* v. *Gooch*, 278.

7. To rebut this presumption, the admissions of the maker and his administrator are both competent; but the mere admission of

the administrator that *he* had not paid it would not be sufficient to rebut the presumption as to his intestate. *Ibid.*

8. Ordinarily, evidence to rebut the statute of presumptions ought to embrace the whole period. *Ibid.*

9. Where, in a former action in which *the same* instrument was in controversy, the administrator of the maker did not deny the *allegation* that the bond had not been paid: *Held*, that upon the trial of a subsequent action, in which the question of payment was an issue, the record of this admission could be read as evidence to rebut the presumption of payment. *Ibid.*

10. The fact that such former action was decided in favor of the defendant cannot avail to affect or lessen the weight of the admission. *Ibid.*

RAILROADS:

1. When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass over, injures him. *McAdoo* v. *Railroad*, 140.

2. Where one is not a trespasser in using the track as a footway, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. *Ibid.*

3. Where the servant, who is running an engine, sees another standing on the track in front of him whom he does not know at all, or who is known by him to have ordinary intelligence and full possession of all of his senses, the former is not required to stop his engine, but may assume that the latter will step off the track. *Ibid.*

4. Where plaintiff alleged in his complaint that he was returning from his place of business to his home, along defendant's track, "as he had been in the habit of doing for several years without objection from the defendant, within the corporate limits of the town of Greensboro, *when, owing to the gross negligence of the defendant's servants*, he was struck from behind by a locomotive engine, belonging to the defendant, &c., and thrown from the track was thereby much injured," and the jury, in response to the first issue, found that the plaintiff was "injured by the negligence of the defendant, *as alleged*": *Held*, that the verdict meant only that the defendant, by failure to exercise ordinary care, injured the plaintiff. *Ibid.*

5. In an action against a railroad company for the destruction of a portable steam-engine, which had stalled on a crossing, it appeared that the driver, on seeing a train turn a curve about one thousand yards distant, ran up the track, waving a handkerchief, and that the engineer made no effort to stop the train until within about three hundred yards of the crossing, although he noticed the driver waving his handkerchief as soon as he turned the curve, and his fireman called his attention to the obstruction when he was about six hundred yards from the crossing: *Held*, that the engineer was negligent, if, by watchfulness, he could have seen that the road was obstructed in time to stop his train before reaching the crossing *Bullock* v. *Railroad*, 180.

6. Where it appeared that plaintiff's driver went on the track to see whether any train was approaching before he attempted to cross, the fact that he did not examine the crossing, and that he did not look at his watch to see whether it was about train time, does not constitute such contributory negligence as will prevent plaintiff from recovering, it appearing that the stalling would not have occurred if the crossing had been in good condition. *Ibid.*

RAILROAD CROSSINGS, 180.

REFEREE: See REFERENCE.

REFERENCE:

1. Exceptions to a referee's report may be filed as a matter of right at the term to which the report is made. The filing of exceptions after that term is in the discretion of the Judge, and from the exercise of such discretion no appeal lies. *McNeill* v. *Hodges*, 52.

2. When the exceptions to the report of a referee are overruled, and, upon appeal to this Court, judgment is affirmed, such exceptions cannot be reviewed, and the questions raised by them and passed upon by this Court cannot be unsettled. *Burwell* v. *Burgwyn*, 507.

REGISTRATION OF DEED:

See PROBATE AND REGISTRATION OF DEED.

REHEAR, Application to:

When this Court, in its application of the law to the facts of a case, omits to consider material facts, and the interests of parties are thereby affected, a petition to rehear will be granted, and, in so far, the former opinion will be modified and judgment reformed. *Gay* v. *Grant*, 478.

REMOVAL OF CAUSE:

When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed, at the next term thereof, and before the term of the Court in the county to which it was removed, to direct that the action be dismissed if the costs of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript. *Fisher* v. *Mining Company*, 123.

RES JUDICATA:

When the exceptions to the report of a referee are overruled, and, upon appeal to this Court, judgment is affirmed, such exceptions cannot be reviewed, and the questions raised by them and passed upon by this Court cannot be unsettled. *Burwell* v. *Burgwyn*, 507.

RULE 17–27, 56, 127.

SALE:

1. When C. agrees to deliver on board plaintiff's schooners at certain landings lumber every month till, in the aggregate, it shall amount to 4,500,000 feet, with the further stipulation that such cargo shall be shipped from the landing to Elizabeth City at plaintiff's risk, and there measured, inspected and paid for: *Held*, that the plaintiff was entitled to recover two cargoes, so shipped, in an action of claim and delivery brought against a creditor of C., who had caused one cargo to be seized before, and the other after, being discharged at Elizabeth City, under a warrant of attachment issued in an action against C. *Albemarle Lumber Co.* v. *Wilcox*, 34.
2. When property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or, by the terms of agreement, can be ascertained (as in our case by measurement and inspection), the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement until the quantity can be definitely determined, makes the sale complete. *Ibid.*
3. Where there is an actual delivery, but no distinct agreement as to the exact price of an article, and no means provided of making it certain, the title does not pass, and, if the person consume the article so delivered to him, he becomes liable on an implied promise to pay the reasonable value, but not by force of the inchoate contract to sell. *Ibid.*

SALE, CONDITIONAL:

1. Before the act of 1883, there was no law in this State requiring the registration of a conditional sale. *Perry* v. *Young*, 463.

2. Where, under the law as it then stood, A sold a mule to B, and, in writing, retained title as security for the purchase-money unpaid, and then afterwards (but before the Act of 1883) allowed B to exchange his mule for a horse, under a verbal agreement that he should stand in the place of the mule: *Held*—(1) that both transactions were conditional sales, valid at that time without registration; (2) that subsequent innocent purchasers for value, of the horse from B could not maintain title against A—the doctrine of *caveat emptor* applying. *Ibid.*

SALE, EXECUTION:

1. One C., as executor, recovered judgment against the defendant on a debt due to his testator by contract before the year 1867, and caused execution to issue. The defendant paid to the Sheriff the principal and interest of the judgment, and took his receipt therefor (not including costs). The Sheriff sold the land of defendant, already levied on to satisfy the costs, at which sale plaintiff bought, and brings this action to recover possession: *Held*, that the right to recover disbursements, in case of default in payment, being secured by law, when the contract was made, entered into and formed a part of it, and such costs as incidents of the judgment constitute a lien upon the same property, and to the same extent, as the principal and interest of the debt. *Long* v. *Walker*, 90.

2. This lien exists in favor of the officers of the Court when they do not require the plaintiff, as they have a right to do, to pay their fees in advance. In such instances the officers (Sheriff and Clerk of the Court) have the right of retainer to the extent of the costs out of the amount collected, and neither can be compelled to look exclusively to the plaintiff's prosecution bond, nor prevented from exhausting his remedy against the debtor, by reason of any receipt or compromise between the judgment creditor and debtor. *Ibid.*

3. The receipt given in this case did not operate, like the receipt of principal and interest of a debt, while suit is pending for its collection, to extinguish plaintiff's claim against defendant for the costs incident to the action, in the absence of some special agreement to the contrary. *Ibid.*

4. If the sale of defendant's land under the execution would have been valid without allotting him a homestead thereon, when the principal and interest of the debt had not been paid, the estate

of the debtor passed to the plaintiff under the sale to satisfy the costs due by virtue of the execution. *Ibid.*

SHERIFF:

1. Amercement, and not civil action, is the remedy given against a Sheriff for not making "due and proper" return of process. *Manufacturing Co.* v. *Buxton*, 74.

2. When, in an action against a Sheriff for a false return, the Court permits such return to be amended, the plaintiff should note his exception, and, unless the amended return is admitted to be true, proceed to try the issue. An appeal before final judgment on such admission, or a verdict, is premature and will be dismissed. *Ibid.*

STATUTE OF LIMITATIONS: See LIMITATIONS. STATUTE OF.

TAXES AND TAXATION:

The rolling stock of a non-resident railroad corporation passing through the State for purposes of inter-State commerce is not liable to taxation in this State. *Bain* v. *Railroad*, 363.

Retaxation of costs, 167.

TORTS:

1. In actions arising *ex delicto* there is no degree of negligence that can be described by the word "gross" alone; but when an *injury* is due directly to the wanton or wilful act of another, he is not absolved from liability by the concurrent negligence of the injured party, as he is not, where, by the exercise of ordinary care, he could, notwithstanding the fault of the injured party, have saved the latter harmless. *McAdoo* v. *Railroad*, 140.

2. It is not proper to treat the word "gross" as synonymous with wilful, malicious or fraudulent. *Ibid.*

TRANSACTION WITH DECEASED PERSON:

1. The wife of a deceased husband is a competent witness in an action affecting his estate, except as to transactions and communications between herself and him, though she be interested in the result of the suit. *Norris* v. *Stewart*, 455.

2. Objection to the introduction of such inhibited transactions and communications must be interposed when the witness is proceeding to testify. *Ibid.*

3. Evidence of general good character is not admissible as a defence against an allegation of *fraud*. *Ibid.*

4. It is essential that the character be put in issue by the nature of the action itself before such evidence is admissible. *Ibid.*

TROVER:

1. An unsatisfied judgment in an action of claim and delivery is no bar to a subsequent action between the same parties for damages for the conversion of the property in controversy. *Asher* v. *Reizenstein*, 213.
2. Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff in such action for damages for the conversion of the property: *Held*, that he was entitled to recover. *Ibid.*
3. The Superior Court has jurisdiction of an action for damages for the conversion of property where the amount claimed is one hundred and twenty-five dollars. *Ibid.*

TRUSTS AND TRUSTEES:

1. The general principle that a consideration is necessary to raise a trust, and that equity will protect against one holding the legal title, the beneficial interest of him who pays the purchase-money for property, had its origin in the old doctrine governing uses. *Thurber* v. *LaRoque*, 301.
2. The rule that a resulting trust is raised in favor of the person who pays the purchase-money for land, though the title may be made to another, is subject to the qualification that when the person who pays the price is under legal, or even, in some instances, moral obligation to maintain the person in whose name the purchase is made, there is a presumption in equity that the purchase is intended as an advancement or gift to the recipient. *Ibid.*

USURY:

1. When B. made a mortgage to W. to secure the indebtedness of a firm at and after a certain time, and also before that time, there was other indebtedness due by the firm to W., upon all of which usurious interest had been charged: *It was held*, that B. could not be allowed a rebate for usury, so charged before she made the mortgage. *Burwell* v. *Burgwyn*, 498.
2. She could only be affected by usurious interest charged after she became liable for the debts of the firm, and then only to the extent of her liability. *Ibid.*
3. Where the usurious interest is reduced to and included in a judgment, the judgment cannot be impeached as to that part, but is valid as a whole. *Ibid.*

4. The proceeds of sale of B.'s mortgaged land must be applied to the discharge of the mortgage debt rendered to judgment, without regard to the fact that a part of it is usurious. *Ibid.*

VENDOR AND VENDEE:

1. Parol evidence is not admissible to prove the terms of a verbal agreement to convey land, when the party against whom it is asserted denies its existence. *Fortescue* v. *Crawford*, 29.

2. Nor will a receipt containing no description of the land, but simply reciting that the money was the balance, or on account of land, be sufficient to admit parol evidence in support of the agreement. *Ibid.*

3. A survey and plat of the land, made under the direction of the alleged vendor, containing no reference to the receipt alleged to have been given for the purchase-money, will not be sufficient to uphold the agreement; nor will parol evidence be received to connect it with such receipt. *Ibid.*

4. In an action to recover possession of land, the defendant set up a parol contract by the plaintiff to convey. which was denied: *Held*, that it was improper to submit to the jury an issue in respect to the making of such contract; and the only issues which ought to have been submitted were the amount of payments made by the vendee, and the value of the betterments placed by him on the property, and of the rents and profits with which he should be charged. *Ibid.*

VENUE:

1. When an action relating to real estate is brought in a county other than that in which the land is situated, the Judge *must*, upon proper application made in apt time, direct its removal to the proper county. *Manufacturing Co.* v. *Brower*, 440.

2. The fact that there are other questions to be determined in the action does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending. *Ibid.*

3. The question of removal, when the action is not brought in the proper county, is not one of discretion. When the statute imposes a duty, "may" means *must*. *Ibid.*

VERDICT:

When defendant not entitled to recover upon the whole verdict, 140.

Contradictory verdict, 333.

WAIVER:

What sufficient waiver of lien for materials furnished, 14.

WILL:

1. A testator devised as follows: "*Item.* It is my will and desire that my beloved wife, Sallie R. Dixon, shall hold, use, occupy and enjoy my entire estate, both real and personal, as I have done heretofore, to care for my children in the same way, during her natural life, with power to dispose of any surplus stock of farming implements she may find as unnecessary in carrying on the farm, and apply the proceeds of such sale to the support of herself or family: to have no public sale of my property; to act as her better judgment may dictate to her in the management of my estate and children, with authority at her death, if any of our children should be minors, to choose for them a guardian to take charge of their portion of my estate. *Item.* I leave it at the discretion of my beloved wife, Sallie R. Dixon, as my children shall arrive at the age of twenty-one years, to allot to them at her pleasure, such portion or part as she may choose to do, not to exceed their *pro rata* of my estate: *Held*, that the wife had no authority to create debts chargeable against the testator's property, not even for the support of herself and children, or the cultivation of the land. *Rountree* v. *Dixon*, 350.
2. An attorney cannot terminate his relation with his client at pleasure and without notice, so long as anything remains to be done about the matter in which he is employed. *Gooch* v. *Peebles*, 411.
3. So, where P. was the attorney of an executrix and trustee under a will (she having also an interest in the property devised), who was afterwards removed and another administrator *d. b. n. c. t. a.*, having adverse interest, was appointed in his place, and P. became his attorney in the settlement of the estate: *Held*, that P.'s relations were so conflicting and antagonistic that the law would not sanction his action, and this, though no compensation was actually paid him. *Ibid.*
4. And where, in proceedings by such administrator to sell certain lands of his testator for assets, the attorney, P., who, having purchased an interest of the testator's husband in the lands, was co-defendant with his client, the executrix, obtained a decree of Court without her knowledge, whereby he became entitled to the surplus proceeds of such sale: *Held*, he could acquire thereby no interest adverse to hers, and the decree should be vacated, so far as it affected or declared his interest. *Ibid.*

5. The conflict of his *duty* as attorney for the administrator, charged with protecting the interests of the executrix and her *cestui que trust* under the will with his interest, as one of the defendants asserting a claim against the estate, cannot be permitted in a Court of justice. *Ibid.*

6. Where a testator devised certain real estate to his wife for life or widowhood, and after her death, to his three daughters, naming them, "as long as they wish to keep house together," providing for sale and division among "his children and their heirs," if they (his daughters) "should marry or wish to quit keeping house," and one of the daughters, the others being dead, was still keeping house on the land; *Held*, the land was not subject, during her life, to partition among the heirs. *Hays* v. *Davis*, 482.

WITNESS:

1. Upon the trial of an action involving the *bona fides* of a deed conveying land, it was in evidence that both parties claimed under one C.—the plaintiff through execution sale, the defendant by private sale. C. died pending suit, but his deposition, taken on behalf of the defendant, was, without objection of the plaintiff, admitted, in which he testified in relation to the circumstances of the alleged fraudulent sale and conveyance of defendant: *Held*, that under the last clause of § 590, *The Code*, the defendant became a competent witness in his own behalf, in respect to the same transaction. *Nixon* v. *McKinney*, 23.

WITNESS TICKETS, 167.

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